United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1011

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P/S

To be argued by
DOMINIC F. AMOROSA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1011

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH MAGNANO, a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BOLELLA, ANTHONY DE LUTRO, a/k/a "Tony West", ANTHONY SOLDANO, and FRANK LUCAS,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Magnano, a/k/a "Joe the Grind" (Magnano") Frank Pallatta, a/k/a "Bolot", a/k/a ""Nose" ("Pallatta"), Richard Bolella ("Bolella"), Anthony De Lutro, a/k/a "Tony West" ("De Lutro"), Anthony Soldano ("Soldano"), John Gwynn ("Gwynn") and Frank Lucas ("Lucas") appeal from judgments of conviction entered December 3, 1975 and January 27, 1976, in the United States District Court for the Southern District of New York, after a five-week trial before the Honorable Irving Ben Cooper, United States District Judge, and a jury.*

* Gwynn's appeal was dismissed by this Court's order of April 22, 1976.

Indictment S 75 Cr. 687, filed July 10, 1975, superseded Indictment 75 Cr. 24, filed January 9, 1975, and charged twenty defendants in seventeen counts with conspiracy and substantive violations of the Federal narcotics laws.

Count One charged all appellants and Louis Macchiarola, a/k/a "Red Hot", Michael Carbone, Dominic Tufaro, a/k/a "Donnie Boy", Frank Ferraro, a/k/a "Skooch", Carmine Margiasso, a/k/a "Charlie", Joseph Malizia, a/k/a "Patsy Pontiac", Ernest Malizia, William Chapman, a/k/a "Chappy", St. Julian Harrison, Gerard Cachoian, a/k/a "Coco", Roberto Rivera and Gabriel Rodriguez, a/k/a "Cass" a/k/a "Cassanova" with conspiracy under 21 U.S.C. § 846 to violate the Federal narcotics laws from January 1, 1973, through July 10, 1975, the date of the filing of the Indictment.

Counts Two through Four charged Magnano, Pallatta and Bolella along with defendants Louis Macchiarola, a/k/a "Red Hot", Michael Carbone, Dominic Tufaro, a/k/a "Donnie Boy", Frank Ferraro, a/k/a "Skooch", and Carmine Margiasso, a/k/a "Charlie", with distributing approximately two, four and twelve kilogram quantities of heroin in March and November, 1973, respectively. Count Five charged Lucas along with defendant St. Julian Harrison with possessing with intent to distribute approximately three kilograms of heroin in or about March 1973. Count Six charged Lucas with possessing with intent to distribute approximately four kilograms of heroin and two kilograms of cocaine in or about October 1973. Count Seven charged Lucas with possessing with intent to distribute approximately ten kilograms of heroin on or about December 1, 1973. Count Eight charged De Lutro with distributing and possessing with intent to distribute approximately five kilograms of heroin in or about November 1973. Count Nine

charged Soldano with distributing and possessing with intent to distribute approximately three kilograms of heroin in or about January 1974. Count Ten charged Gwynn with possessing with intent to distribute approximately one-quarter kilogram of heroin in or about March 1973. Count Eleven charged defendant Cachoian with possessing with intent to distribute one-eighth kilogram of heroin in or about April 1973. Count Twelve charged defendant Rivera with possessing with intent to distribute two kilograms of heroin in or about September 1973. Count Thirteen charged defendant Caravella with possessing with intent to distribute one-half kilogram of heroin in or about December 1973. Count Fourteen charged Gwynn with distributing and possessing with the intent to distribute 159.5 grams of cocaine on or about October 30, 1973. Count Fifteen charged Gwynn with distributing and possessing with intent to distribute 151.5 grams of cocaine on or about December 20, 1973. Count Sixteen charged Gwynn with distributing and possessing with intent to distribute 148.5 grams of heroin on or about January 15, 1974.

Trial commenced September 24, 1975, against appellants and defendant Chapman. Defendant Cachoian pleaded guilty to Count Eleven prior to trial. Defendant Rivera pleaded guilty to Count Twelve on the second day of trial. The remaining defendants were severed.*

On October 24, 1975, the jury found Magnano, Pallatta, De Lutro, Soldano and Lucas guilty in all counts in which they were charged. The jury found Bolella guilty in Counts One and Four, and did not reach a verdict as to him in Counts Two and Three. The jury found

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* Defendants Macchiarola, Carbone, Tufaro, Ferraro, Margiasso, Joseph Malizia, Ernest Malizia and Rodriguez were, and remain, fugitives from justice. Defendants Caravella and Harrison were severed on consent.

Gwynn guilty in Counts One, Ten and Sixteen, and did not reach a verdict as to Counts Fourteen and Fifteen. The jury did not reach a verdict as to defendant Chapman.

On December 3, 1975, Judge Cooper sentenced Magnano and Pallatta to fifteen years' imprisonment each on each of Counts One through Four, the sentences on Counts One and Two to run consecutively, and the sentences on Counts Three and Four to run concurrently with those on Counts One and Two, to be followed by three years' special parole. Judge Cooper sentenced Bolella to ten-years' imprisonment on Counts One and Four, the sentences to run consecutively, to be followed by three years' special parole. Judge Cooper sentenced De Lutro as a second federal narcotics felon to twenty-five years' imprisonment on Counts One and Eight, the sentences to run concurrently, to be followed by six years' special parole. Judge Cooper sentenced Soldano to fifteen years' imprisonment on Counts One and Nine, the sentences to run concurrently, to be followed by three years' special parole. Judge Cooper sentenced Gwynn to eight years' imprisonment on Counts One, Ten and Sixteen, the sentences to run concurrently, to be followed by three years' special parole.

On January 27, 1976, Judge Cooper sentenced Lucas as a second federal narcotics felon to twenty years' imprisonment on each of the four counts in which he was found guilty, the sentences on Counts One and Five to run concurrently, the sentences on Counts Six and Seven to run concurrently with each other and consecutively to the sentences imposed on Counts One and Five, to be followed by six years' special parole. Judge Cooper also fined Lucas $50,000.00 on each of the four counts, a total committed fine of $200,000.00.

All defendants were remanded after the jury's verdict and are currently in custody.

Statement of Facts

A. The Government's Case

1. Introduction

The Government's evidence, presented through the testimony of 17 witnesses and approximately 82 exhibits, established "one of the largest domestic heroin cases in the history of narcotic law enforcement" with "enormous quantities of heroin bought and sold on an almost daily basis." * This massive heroin conspiracy was described at trial by co-conspirators Mario Perna ("Perna") and Anthony Verzino ("Verzino"), both of whom testified for the Government.** From their testimony, as corroborated by the other evidence, the jury permissibly found a single conspiracy in which Magnano, Pallatta, Bolella, De Lutro and Soldano, together with other defendants who remain fugitives, supplied Perna, Verzino and defendant Ernest Malizia ("Malizia"), who is likewise a fugitive, with more than 150 pounds of heroin for distribution throughout the New York metropolitan area. The heroin distribution partnership of Perna and Malizia, which Verzino joined in August or September 1973, formed the core of this conspiracy. Lucas, the partnership's largest customer, controlled his own large street-level heroin distribution organization, and during the conspiracy purchased more than 100 pounds of heroin for more than $1 million in cash.

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* This is the description Judge Cooper gave at the December 3, 1975, sentencing (Minutes, pp. 51, 52).

** Both Perna and Verzino have pleaded guilty to related narcotics charges and are presently incarcerated.

2. Pallatta's group sells two kilos of heroin to the core partnership

In late February 1973, Perna met with Malizia, whom he had known for several years, and who was at that time a fugitive in an unrelated federal case (Tr. 471), at the Evergreen Bar in Brooklyn, New York, and agreed with him to go back into the narcotics business (Tr. 453-454).* Over the next several days, they attempted to locate a source of supply for heroin (Tr. 454-55), and finally met with Pallatta, with whom Malizia had had prior narcotics dealings. Malizia introduced Pallatta to Perna as Frank "Bolot", and asked Pallatta whether he could obtain heroin for them. Pallatta replied that he would have to check with his partners, and that if he did get heroin it would probably be diluted. Pallatta, Perna and Malizia agreed to meet again the following Sunday night at the Raceway Diner in Yonkers, New York (Tr. 457-66).

The following Sunday night at the Raceway Diner, Pallatta told Perna and Malizia that he had spoken to his partners and they could supply heroin which Perna and Malizia "could add a four or five to" which meant that Perna and Malizia could make four or five kilos out of each kilo supplied by diluting it. Pallatta said he would supply two kilos at $25,000 per kilo. A meeting was arranged for the next night at the Adventurers Inn in the Cross County Shopping Center in Yonkers (Tr. 466-70).

The next night, by now the beginning of March, Pallatta met with Perna and Malizia at the Adventurers Inn,

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* Perna had been released May 5, 1972, from the Federal Penitentiary, Atlanta, Georgia, where he had been serving a sentence for a federal narcotics conviction (Tr. 452-453).

"Tr." refers to the trial transcript; "GX" refers to Government's Exhibits.

and told them the heroin would be delivered by a person named "Skooch" * whom they could find that night at the Allerton Theater on Allerton Avenue in the Bronx, and that they could have a week to ten days to pay for it (Tr. 475-477). Pallatta, Perna and Malizia agreed to meet again the following Sunday night (Tr. 477), and Perna and Malizia left. They drove to the Allerton Theater where, after a while, Skooch arrived. Malizia spoke with Skooch, and Skooch then delivered two kilos of heroin in a bag to Perna (Tr. 478-479). Skooch told Perna the bag contained two "packages" which the parties understood to mean two kilos of heroin (Tr. 489).

Perna and Malizia diluted a sample of the heroin Skooch had delivered, and Perna tested its potency by having an addict named Floco inject it (Tr. 480-483). Being satisfied with the quality of the heroin they had gotten from Pallatta, Perna and Malizia tried to sell it in bulk, but were unsuccessful. They therefore decided to sell it in one-eighth and one-quarter kilo quantities (Tr. 485-489). This they did over the next several days to Floco, Joseph Condello ("Condello"),** Gwynn, and two persons whom Perna knew as "Joe" and "Cass", respectively (Tr. 495-510).

As arranged, Perna and Malizia met Pallatta, Skooch and "Donnie Boy" *** at the Adventurers Inn the next Sunday. An extension of their time to pay for the two kilos was agreed (Tr. 513-516), and over the next several days they paid Pallatta and his group $40,000 in cash on account (Tr. 539-542, 547-548).

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* "Skooch" was identified as Frank Ferraro (Tr. 2901) and was indicted in this case. He is presently a fugitive.

** In January 1974, Perna asked Condello to kill Verzino (*infra*, p. 17-18).

*** "Donnie Boy" is charged in this case as Dominic Tufano. He is presently a fugitive.

3. Lucas meets Perna and Malizia and pays them more than $1 million for heroin

While these events were going on, William Chapman, a/k/a "Chappy" ("Chapman"), introduced St. Julian Harrison ("Harrison") to Perna and Malizia, and Harrison agreed to buy from them three kilos of heroin at $28,000 each (Tr. 544-548).* Perna and Malizia then met Pallatta at the Adventurers Inn and asked for an additional four kilos (Tr. 547). These were delivered to them by Skooch at the Allerton Theater, and they in turn, further diluted the heroin and delivered three kilos of it to Harrison (Tr. 547-552).

Harrison was unable to pay for this heroin, and introduced Perna and Malizia to Lucas who told them he would assume Harrison's liability and could buy all the heroin they could supply, but only if the price, and possibly the quality were better. Lucas specifically agreed to pay for the three kilos Harrison had bought at $28,000 per kilo (Tr. 553-59).

Several days later Lucas gave Perna and Malizia $56,000 in cash in part payment for the three kilos, and they later gave this $56,000 to Pallatta, Magnano, Donnie Boy and Skooch at the Adventurers Inn. During this meeting, Magnano said that Pallatta had spoken to their partners and they would now be able to sell heroin to Perna and Malizia for $22,000 per kilo instead of the $25,000 they had been paying (Tr. 567-72).

In early April, Skooch delivered a further six kilos of heroin from Pallatta's group to Perna and Malizia.

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* Harrison and Chapman were charged as defendants in this case. Harrison's case was severed on consent, and the jury did not reach a verdict on Chapman. Chapman was murdered March 13, 1976.

Perna and Malizia sold five of these kilos to Lucas for $25 000 each, and delivered them in the same suitcase in which they had come from Skooch (Tr. 575-581).

From April 1973 through the beginning of August 1973, Perna and Malizia delivered approximately 35 additional kilograms of heroin to Lucas for which he paid them approximately $900,000 in cash (Tr. 581-85). Perna and Malizia obtained this heroin from Pallatta, Magnano and Donnie Boy, and paid them "about $400,000 or $500,000" for it (Tr. 625-33).*

4. Verzino joins the Perna-Malizia core partnership

In late August or early September 1973, Verzino, who had been released from the Atlanta Penitentiary on August 24 after serving a sentence for a federal narcotics violation, met in Brooklyn with Perna and Malizia, both of whom he had known for many years (Tr. 1843-1846). Malizia told Verzino that he and Perna were partners in the heroin business (Tr. 1847) and Perna said they had gotten narcotics from some "old friends" of Verzino's, namely Pallatta, Magnano and Bolella, whom Verzino had known nearly all his life and with whom he had had narcotics dealings prior to his incarceration in 1966 (Tr. 1848-1849, 1863-1871; see Tr. 647-648). Verzino asked where he could find Bolella, and was told he might be in Florida but if he was in the New York vicinity he could be found at various specified places in Yonkers or the Bronx (Tr. 1849). (Back in March 1973, Pallatta had told Perna and Malizia that the reason Bolella was

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* During this April to August period, Perna and Malizia were also regularly delivering to Gwynn and others additional heroin which they obtained from Pallatta, Magnano and Donnie Boy (Tr. 572, 655).

not attending their narcotics meetings was that he was in Florida for several months (Tr. 540-541).) Malizia asked Verzino if he would like to join the partnership, and Verzino replied that he first wanted to talk with Tony Stassi.*

A day or two later, Verzino met with Pallatta at the Moon Pick Social Club in the Bronx (Tr. 1850). Pallatta asked Verzino if he was "' with them other guys' . . . 'Ernie and that guy Mario'" (Tr. 1852). Upon receiving an affirmative response, Pallatta said that Perna and Malizia had been buying heroin from him and his partners and owed them a large amount of money (Tr. 1852-1853). Pallatta also told Verzino that while he was in jail the heroin business had changed, the price of heroin had risen and many people were being arrested (Tr. 1853). Verzino told Pallatta that he would probably team up with Perna and Malizia (Tr. 1853), and that Perna and Malizia were complaining because they could not buy pure heroin from Pallatta and his partners (Tr. 1855). Pallatta said that he was involved in a six man partnership and wasn't selling pure heroin because of the prices he and partners were paying (Tr. 1855).** Pallatta said further that the controlling partners were Macchiarola and Carbone, who had made a connection for heroin while they were in jail (Tr. 1855-1856, 1908).

A day or two after his conversation with Pallatta, Verzino again met with Perna and Malizia and told them he had decided to join them in their narcotics business (Tr. 643-645; 1871-1872). Verzino told them that he

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* While they were incarcerated at Atlanta, Verzino and Perna had conspired with Tony Stassi and others to import into the United States some 200 kilos of heroin (Tr. 955, 1034-1037).

** The six partners were: Pallatta, Magnano, Bolella, defendant Michael Carbone, defendant Louis Macchiarola ("Red Hot"), and defendant Dominic Tufaro ("Donnie Boy") (Tr. 1908).

would look around for some new customers and a source of supply for pure heroin (Tr. 1874).

Thereafter Verzino became a partner with Perna and Malizia (Tr. 1875), and, over the next several months, obtained several new half-kilo and kilo heroin customers for the partnership (Tr. 1875-76). Verzino also met and conducted the heroin business with the partnership's existing heroin customers, including Lucas and Gwynn (Tr. 646-655, 1876-87, 1896-1900).*

5. Verzino meets with Bolella

Verzino's efforts to locate Bolella soon met with success. In late September or early October 1973, Verzino, Perna and Malizia, took a suitcase containing approximately $87,000, with which to pay for heroin already purchased, to Pallatta, Magnano, Donnie Boy, Skooch and "Charlie" ** at the Cross County Shopping Center in Yonkers. When they arrived at the parking lot of the Shopping Center, Verzino took the suitcase with the cash and handed it to Skooch and Charlie. He then entered a car occupied by Pallatta, Magnano, Perna, Malizia and Donnie Boy, and told Pallatta, Magnano and Donnie Boy that he had taken $5000 from the cash he, Perna and Malizia were delivering as a gift for himself to which Pallatta said "' No, we will just leave it on the tab'." (Tr. 1913-1914). After a general conversation as to arrangements for the delivery of additional heroin, Verzino left with Pallatta and Donnie Boy and went to the Trade Winds Motel in Yonkers to meet Bolella (Tr. 1903-15).

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* At trial, Perna estimated the partnershihp's net worth in early August at about $1.2 million (Tr. 626).

** "Charlie" was indicted in this case as Carmine Margiasso. He is presently a fugitive.

At the motel, Verzino met with Bolella and asked him about the possibility of obtaining pure heroin. Bolella said that he would try to "ask the others" but that "it was difficult" because "they couldn't make much profit" that way (Tr. 1922-1923). Bolella mentioned that Malizia had already asked him about the same thing (Tr. 1923). During the meeting, Verzino and Bolella exchanged telephone numbers, to be used only if necessary, and agreed upon a code in which Bolella would "say it was Blondie" if he called Verzino (Tr. 1917-1918). When Verzino was arrested in February 1974, he had on his person a phone book (GX 45) with Bolella's telephone number set against the name "Blond" (Tr. 2087, 2876).

6. De Lutro sells five kilos of pure heroin to the core partnership for $250,000

Early in November 1973, Verzino met with De Lutro, whom he had known for years, at Raymond's Restaurant, 29th Street and Second Avenue, Manhattan.* De Lutro told Verzino that the price of heroin was high at that time, anywhere up to $60,000 or $65,000 per kilo. Verzino said he could get heroin for $20,000 or $25,000 per kilo, and De Lutro replied that he would purchase all the heroin Verzino could supply at that price. Verzino said he would get back to De Lutro (Tr. 1931-35).

Verzino then met with Perna and Malizia, and they agreed Verzino should try to purchase pure heroin from De Lutro for up to $60,000 per kilo, because even at that price they were better off than they were purchasing diluted heroin from Pallata's group (Tr. 1935-36).

Verzino thereafter again met De Lutro at Raymond's, told him that he had spoken to some people who had

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* De Lutro was also known as "Tony West" (Tr. 3241).

confirmed what De Lutro had said about the price of pure heroin, and said that, consequently, he was willing to buy pure heroin from De Lutro. After some bargaining, Verzino and De Lutro agreed that De Lutro would sell Verzino five kilos of pure heroin for $250,000, with over $200,000 to be paid in advance. An appointment was made for the transaction to be consummated the next evening (Tr. 1936-40).*

Verzino, Perna and Malizia raised $234,000 in cash the next day (Tr. 1941). They then went to the vicinity of Raymond's bar, and, after leaving Perna and Malizia at another nearby bar, Verzino went into Raymond's and met with De Lutro. He told De Lutro he had $234,000. De Lutro said $234,000 was all right, and "asked if there was a lot of small bills" because "if there was too many small bills the people he was going to might charge him interest one percent for changing the money into larger bills" (Tr. 1942-1943). Verzino assured him that there "wasn't that many small bills, that the majority was twenties, fifties and hundreds" (Tr. 1943). The money was given to De Lutro immediately thereafter on a side street outside Raymond's by Verzino placing the box in which the money was contained into the trunk of a car which De Lutro was driving. Verzino then told De Lutro that he would be waiting for De Lutro to return with the heroin in the bar where Perna and Malizia were waiting for him (Tr. 1943-1944).

Verzino then joined Perna and Malizia in the other bar and waited for DeLutro to return. When De Lutro returned, he told Verzino, Perna and Malizia that there would be a delay and that they might have to go to Queens to pick up the heroin. After some additional discussion,

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* Five kilos of pure heroin, after dilution for sale in the street, are worth approximately $5 million (Tr. 1569).

it was agreed that De Lutro would deliver the heroin the next night in the vicinity of the Hill Cafe on Third Avenue between 35th and 36th Streets in Manhattan (Tr. 1944-48).

The next night Verzino met with De Lutro in the vicinity of the Hill Cafe and, on De Lutro's instructions, took a box from the trunk of De Lutro's car. Verzino told De Lutro to return to Raymond's and he would let him know if everything was all right (Tr. 1948-50).

Later that night Verzino, Perna and Malizia weighed and tested the heroin De Lutro had sold them. The test revealed that the heroin was pure, but approximately eight ounces less than the five kilos De Lutro had agreed to sell. After some discussions as to whether they should return the heroin, it was agreed that they would keep it but tell De Lutro about the shortage. Verzino then called De Lutro at Raymond's * from a phone booth and told him that the heroin was acceptable but there was a problem which he would discuss with De Lutro the next day (Tr. 676-677, 679-680, 1948-50, 1952-55).

The next night Verzino, Perna and Malizia met De Lutro at a bar on Second Avenue and 30th Street and discussed the shortage of heroin. Verzino, Perna and Malizia all complained about the shortage, and Malizia asked De Lutro if his people took them for "'dopes?'." Malizia said: "' Don't they know we are going to weigh the stuff out and find out if there is a shortage . . . they should know better. They know I am in the business long enough and that it would be tested any way'" (Tr. 683).** De Lutro said that he would make it up the

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* When Verzino was arrested in February 1974, his phone book (GX 45) listed the telephone number at Raymond's against the name "Tony W" (Tr. 2087-2088); De Lutro's alias, as he admitted, was "Tony West" (Tr. 3241).

** Verzino testified the shortage was approximately eight ounces but that they told De Lutro it was ten ounces (Tr. 1956).

next time he sold them heroin, and asked when they would pay him the $16,000 they owed him of the $250,000 price. They replied that he would get the balance as soon as they had begun to sell the heroin, but that they had not touched it yet because of the shortage and because they had some other heroin on hand. De Lutro repeated that if there was a shortage he would speak to his people about making it up (Tr. 1956-58).

In late November, Verzino and Malizia met De Lutro outside of Raymond's and gave him $16,000 in $100 bills. De Lutro said that he had been trying to get in touch with Verzino because he had more heroin available, and that he could reduce the price if they bought a "substantial amount more" than five kilos (Tr. 1958-62; see Tr. 684).*

7. Pallatta's group learns the core partnership has a source for pure heroin, and sells it additional diluted heroin.

After their purchase of pure heroin from De Lutro, Verzino, Perna and Malizia, in late November, met Pallatta and Magnano in the parking lot of the Cross County Shopping Center in Yonkers. They discussed the quality of the heroin Pallatta's group was selling the partnership, and the possibility that the partnership could buy pure heroin from Pallatta's group. Verzino or Malizia told Pallatta that they had five kilos of pure heroin on hand, and Pallatta became upset and accused them of using money they owed his group to buy heroin from others. Notwithstanding Pallatta's displeasure, he and

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* Verzino also testified that prior to his incarceration in 1966 he had had narcotics transactions with De Lutro in 1961 or 1962, 1964 and 1965 (Tr. 1993-1994).

Magnano agreed to sell an additional large quantity of heroin to the partnership (Tr. 765-67, 1997-2000).

Skooch and Charlie delivered the heroin involved to Perna in the parking lot of the Cross County Shopping Center. The suitcase they delivered contained twelve kilos of diluted heroin. Perna later delivered ten of these kilos to Lucas in the same suitcase (Tr. 769-775, 778-789; 1894-1896).*

8. Malizia has Lucas' and Gwynn's phone numbers in his possession in code when he is arrested

Malizia was arrested in the Bronx on December 18, 1973, as a fugitive, and was remanded in lieu of $750,000 bail. In his possession was a coded list of phone numbers (GX 9), which included Lucas' and Gwynn's home phone numbers (Tr. 798, 1425-1428, 1494-1501, 1617-1618, 2875, 3581-3582).**

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* Perna, Malizia and Verzino continued their narcotics activities with other customers besides Lucas, including Gwynn (Tr. 794-95). On January 16, 1974, Joseph Brzostowski, a Special Agent of the Drug Enforcement Administration, while conducting surveillance on Perna, followed him to 1065 Jerome Avenue in the Bronx, which Perna entered (Tr. 1430-34). At this time, Gwynn lived in this building in apartment 5-C (Tr. 2892).

** GX 9 lists a series of sets of numbers with writing next to each set. When the numbers listed are reversed in order and one digit is added to each, the true phone number is revealed. The entry for Lucas' number read as follows: "Frank 1799627" which is equivalent when decoded to 8370082, Lucas' home phone number at his 1973 residence at 933 Sheffield Road, Teaneck, New Jersey. The entry for Gwynn's phone number read as follows: "JQJ 4215281" which is equivalent when decoded to 2936235, Gwynn's home phone number in December 1973 at his residence at 1065 Jerome Avenue, Bronx, New York (Tr. 2875, 2581-2).

9. Lucas purchases pure heroin from Verzino and Perna

After Malizia's arrest, Verzino and Perna met with Lucas at the Van Cortland Motel. They told Lucas that he was behind in his payments and that if he could not pay what he owed, he would not be able to get more heroin because they themselves would not be able to buy more heroin. Verzino then offered to sell Lucas a kilo of pure heroin for $110,000. Lucas agreed to purchase approximately 1/8 kilo of pure heroin as a sample. Perna later informed Verzino that he had given the pure heroin to Lucas (Tr. 2004-08). At this time, the only pure heroin the partnership had was the heroin purchased from De Lutro the previous month (*supra*, pp. 12-14). Lucas was thus purchasing from the partnership both diluted heroin it had obtained from one of its sources (*supra*, pp. 8-9) and pure heroin it had obtained from another source.

10. Perna asks Condello to kill Verzino and tells Condello and Bradley about his heroin sources

Perna's relationship with Verzino began to deteriorate after Malizia's arrest. Verzino, according to Perna, was drinking excessively, beginning to alienate narcotics customers, and talking loudly about their narcotics business while police officers and agents were present in bars Verzino frequented. Verzino continued this conduct notwithstanding a warning Perna gave him regarding it (Tr. 779-801).

On January 7, 1974, Perna went to the Steak and Brew Restaurant in Ft. Lee, New Jersey, where he met with Condello and "Jimmy". Perna had sold heroin to Condello three or four times previously while Jimmy was present. Condello had introduced Jimmy to Perna as Con-

dello's partner. Perna was unaware that Condello was now cooperating with the federal authorities and wearing a recording device, and that "Jimmy" was Special Agent James Bradley of the Drug Enforcement Administration ("DEA") (Tr. 1463-1470; GX 77, 78 and 79).

During a conversation between Perna and Condello, which took place outside the presence of Special Agent Bradley but which was recorded and introduced in evidence, Perna asked Condello to kill Verzino for him because, he said, Verzino was jeopardizing his safety. Perna also expressed concern that Verzino may have been planning to elminate him from the partnership. In the course of the conversation, Perna made reference to his sources of supply for narcotics, and his largest customer, but did not mention any names (Tr. 802-06, 815-21; GX 78, 79). Condella agreed to kill Verzino; a few days later Perna gave Condello and Bradley a shotgun and a pistol for this purpose (Tr. 806, 821-22; GX 78, 79).*

On January 18, 1974, Perna told Special Agent Bradley, whose true identity he did not know, that he had two sources for heroin. From one source, he could obtain between ten and twenty kilos of diluted heroin on consignment; from the other, who was located in downtown Manhattan, he could purchase smaller amounts of pure heroin if he paid in advance (Tr. 1445-47, 1476-86).

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* Perna had previously attempted to have Verzino, Verzino's wife and a person by the name of William Sorenson killed. This conspiracy occurred while Perna and Verzino were incarcerated (Tr. 822-23).

11. Soldano and Joseph Malizia sell Perna and Verzino three kilos of pure heroin for $150,000

In late January 1974, Soldano delivered to Verzino three kilos of pure heroin, the second pure heroin purchase the partnership had made.

The roots of this transaction go back to at least the early winter of 1973, before Malizia's arrest (Tr. 828, 2009). At that time, Verzino, Perna and Malizia had a meeting with Malizia's brother, defendant Joseph Malizia,* and defendant Frank Caravella ("Caravella"),** at the Golden Gate Restaurant in the Bronx, during which Joseph Malizia asked if he could join the Verzino-Perna-Malizia partnership (Tr. 2009-2010). Malizia said that would be difficult, but the partnership would buy any narcotics Joseph Malizia could get (Tr. 2011). Malizia suggested one possible source, and Joseph Malizia agreed to see that source and also "someone else he knew from downt[ow]n, as he said, downtown" (Tr. 2011). Joseph Malizia was to get in touch with Caravella or Verzino if he located any narcotics (*ibid.*).***

A couple of days before the heroin delivery, Caravella told Verzino that Joseph Malizia had located a heroin source (Tr. 2015-2016). The next day, Verzino and Caravella met Joseph Malizia at Jimmy's Backyard, a bar in Port Washington (Tr. 2017). Joseph Malizia said he "was waiting for a man whom he wanted to speak to" and wanted Verzino "to speak to concerning obtaining some merchandise" (Tr. 2018). In order to "keep some privacy" Joseph Malizia dismissed Caravella from the meeting (*ibid.*).

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* Joseph Malizia was also known as "Patsy Pontiac", as appears in the Indictment. He is presently a fugitive.

** Caravella pleaded guilty to a related State narcotics charge and was severed from this case.

*** Perna also testified concerning this meeting (Tr. 828-829).

After Caravella left, Soldano entered the bar and Joseph Malizia introduced him to Verzino as "Tony". Soldano said he could supply heroin for $50,000 per kilo and asked Verzino how much Verzino wanted. Verzino said he was not sure as he did not know how much cash he could raise. Joseph Malizia asked whether Soldano could give credit. Soldano replied that he was not sure but it was a possibility depending on how much heroin was wanted and how much money could be raised. Verzino said he was fairly positive he could raise approximately $75,000. A further appointment was made for the same place the next day at 2 P.M. Verzino then joined Caravella and returned to New York City (Tr. 2012).

That evening Verzino met Perna at the Jackson Restaurant in the Bronx, told Perna what had happened that day, and agreed with him to raise money to buy the heroin. (Tr. 825-829; 2022-2024).*

The next day Verzino, Perna and Caravella drove to Port Washington in two cars. Along the way, they stopped at the Royal Inn Motor Lodge, where Verzino rented a room in the name Anthony Rossi,** and they counted $75,000 which they had raised (Tr. 824-829; 2026-2028). According to Verzino, they then left the motel and went on to Port Washington; Verzino went to Jimmy's Backyard, and Perna and Caravella went to a bar Caravella had been in the day before when Verzino met Soldano (Tr. 2028-2029).***

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* Also present were Caravella and Malizia's son. Notwithstanding his on-going business relationship with Verzino, Perna was at this time waiting for Condello to kill Verzino (Tr. 824).

** The registration card was introduced into evidence (GX 84).

*** Perna's testimony differs. He testified that after they counted the money at the motel, he and Verzino had an argument as to whether Perna should continue on and Perna decided he would not and returned to New York (Tr. 830-32). Perna never met or saw Soldano, according to his testimony.

When Verzino arrived at Jimmy's Backyard, Joseph Malizia was standing in the parking lot. As they began to talk, Soldano drove into the parking lot in a large, dark blue Buick.* Verzino told them that he had brought $75,000, and arrangements were made for Soldano to meet with Verzino later that day in downtown Manhattan to deliver the heroin. (Tr. 2029-33).

That evening Verzino met Soldano in downtown Manhattan and they exchanged cars. Soldano told Verzino to return to the same spot in about a half hour. Approximately forty minutes later, Verzino returned in Soldano's car and saw Soldano waiting at the curb. Soldano got into the car, took the wheel, and said they would have to g , Queens. Soldano and Verzino then drove to Queens with Soldano driving. In Queens they saw Verzino's car parked on a street. Verzino went to his car, opened the trunk, took a box from it, put it into the car and drove back to New York where he met Perna. The box Verzino found in his trunk contained heroin which he and Perna tested and weighed. The test revealed that Soldano had sold them three kilos of pure heroin. Both the packaging and the purity of this heroin were identical with the packaging and the purity of the pure heroin previously purchased from De Lutro (Tr. 832-35, 2034-42; see *supra*, pp. 12-15).

On the day of the delivery, Verzino gave Soldano $75,000 on account of the $150,000 purchase price. Approximately $67,000 of the balance was delivered to Joseph Malizia by Caravella during February 1974 after Perna's February 1 arrest (*infra*, p. 22). Because of

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* Soldano stipulated that he resided at 63 Soundview Drive, Port Washington, Long Island, approximately a ten minute drive from Jimmy's Backyard, and that in 1974 he had access to and did on occasion drive a dark blue Buick (Tr. 2973, 3501).

Perna's arrest, Verzino took Caravella on a partner, and told him the names of his heroin connections and customers (Tr. 2042-2048).

12. Perna is arrested

On February 1, 1974, Perna was arrested in New Jersey by federal authorities. At the time of his arrest, Perna had in his possession eight kilos of diluted heroin which he had planned to deliver to Condello and Bradley. Perna testified at trial that these eight kilos, as diluted, "were either part of the five kilos we got from Tony West [*i.e.*, De Lutro] or three that come from a fellow by the name of Tony out on Long Island [*i.e.* Soldano]" (Tr. 1195).

The arresting officers also seized from Perna a list of telephone numbers and a piece of paper listing his heroin customers, moneys owed him, and his own owings for heroin transactions (GX 1 and GX 2; Tr. 837-839, 847-848, 856-857, 1194-1195). Included on the phone number list were Lucas' and Gwynn's then phone numbers, Lucas' next to the writing "Frank", and Gwynn's next to the writing "Q" (GX 2; 860-861, 864, 2875-2876, 3581-3582).*

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* The phone list did not include a number for Pallatta. Perna testified he had previously asked Pallatta for a phone number and Pallatta replied that he did not give his phone number out because he never did business over the phone (Tr. 516).

Lucas, however, did do business over the phone, and Perna identified telephone toll records showing several calls from his home to Lucas' number, 201-837-1461, in the period December 1973-January 1974 (GX 3; Tr. 585, 869-873). Compare Lucas Br., p. 8, n. 8, which incorrectly asserts that "GX 3 (Perna's telephone toll slips) show no calls between he and Lucas from December, 1973, to February 1974 (R. 1246-1249)." Lucas changed his phone number after Malizia's arrest.

Perna's narcotics worksheet (GX 1) reads as follows:

"Frank	—	3.10
Gun	—	9.
Ida	—	31.
R.R.	—	
Coco	—	5.
Q	—	28.
Chino	—	8.5
Big J	—	10.
Pee W	—	
Luck	—	
Skinny	—	18.8
Cas	—	18.5
Cockeye	—	13.
Owe F.B		333."

Perna testified that the notation "Frank—3.10" represented that Frank Lucas owed him $310,000 at the time, and that the notation "Q—28." represented that Gwynn owed him $28,000 at the time (Tr. 850-851, 853). Perna also testified that the notation "Owe F.B 333." at the bottom of GX 1 represented that he owed Pallatta, whom he knew as "Frank Bolot" (Tr. 465), $333,000 for heroin previously purchased (Tr. 855).*

13. Verzino is seen with Skooch

On February 7, 1974, Special Agent Jeffrey Hall of DEA was conducting surveillance on Verzino in the Bronx and saw him and Skooch get into a car. The car began to accelerate until Hall lost sight of it; Hall saw the car again later, but at that time Verzino was in it alone (Tr. 2899-2903).

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* Special Agent Peter Scrocca of DEA testified that he grew up in the same neighborhood as Pallatta, Magnano and Bolella and that Pallatta used the name "Bolot" among others (Tr. 2718-2719).

Verzino testified that in mid-February he was in the vicinity of Allerton Avenue and White Plains Road in the Bronx, the new meeting place for Pallatta and his group. He picked up Skooch and as he drove off he saw a car he believed was following him. Pallatta's car then pulled up alongside Verzino's and Donnie Boy, who was in Pallatta's car, told Verzino that he was being followed by two cars. Verzino then accelerated his car, jumped a road divider, proceeded further, and let Skooch out of his car. (Tr. 2048-2051).

14. Verzino is arrested and approximately 26 pounds of heroin is seized from his stash

On February 25, 1974, Verzino and Caravella were arrested in front of 1130 Pelham Parkway in the Bronx.* Subsequent to their arrests they were taken to apartment 4J at that address, which Verzino was then using as a stash for narcotics, where the arresting officers seized approximately 26 pounds of heroin which Verzino, Perna and Malizia had gotten from Pallatta, Magnano, Bolella, De Lutro and Soldano (Tr. 2054-55). This heroin was contained in 28 plastic bags, each containing approximately one-half kilogram. Approximately 20 pounds was diluted heroin and 6 pounds was pure heroin. (Tr. 2675-86; GX 87, 87a).*

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* In mid-February, prior to Verzino's arrest, Perna told Special Agents Bradley and Bocchia that his source for heroin was Pallatta, Magnano and their partners and that his largest customer was Lucas. This testimony was introduced as a prior consistent statement of Perna. (Tr. 2875-61, 3500-01).

At the time of his arrest Verzino had on his person a phone book which contained the telephone numbers of Lucas, Gwynn, De Lutro and Bolella (Tr. 2077-88, 2665-68, 2876; GX 45).*

Verzino also identified a paper seized from his person at the time of his arrest as a narcotics customer list listing the amounts owed him and by whom. There were entries for Lucas, Gwynn and others (Tr. 2056-62, 2665-68; GX 36). The entry for Lucas was "MOOSE-3.10" reflecting that Lucas owed $310,000 (see *supra*, p. 23). The entry for Gwynn was "QUINN-4" reflecting that Gwynn owed $4,000 at the time of Verzino's arrest (Tr. 2059-61; GX 36).**

15. Perna and Malizia meet Lucas in jail and attempt to get the money Lucas owes them

In May or June 1974, Perna and Malizia met Lucas in the Federal House of Detention in New York, where

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* Lucas' number was next to the name "HENRY"; Bolella's number was next to the name "BLOND" (See *supra*, p. 12); De Lutro's number was next to the name "TONY W."; and Gwynn's number was next to the name "J. QUINN" (Tr. 2077-88; GX 45).

Law enforcement officers also seized a small phonebook from apartment 4J on the night of Verzino's arrest. Verzino identified the book as containing a list of customers and money owed from each, and said the list was not current. One of the entries was "HENRY 420", which Verzino testified represented that Lucas owed $420,000 at the time the entry was made (Tr. 2100-03, 2493-94; GX 46).

** Law enforcement officers seized from Caravella at the time of his arrest a paper which the Government contended was identical with Verzino's customer list, except that it did not reflect an entry for "MOOSE" as Verzino's did (Tr. 2667-68; GX 42); the paper found on Caravella did, however, have an entry "gynn-4" which the Government contended corresponded to the $4,000 Gwynn debt shown on Verzino's paper.

all three were then incarcerated.* Perna asked Lucas for the $310,000 which he owed Perna, Malizia and Verzino. Lucas told Perna and Malizia he would make certain they received their money but would not be able to pay the entire sum at one time. He said he would make arrangements with his then attorney, Mr. Galina, to give them $100,000 as a first payment and thereafter to pay the balance in $50,000 installments (Tr. 886-88).

Two or three weeks later, after Lucas was released from custody, Malizia told Perna that he had met with Galina in the interview room at the jail who told him that Lucas had given him $25,000 for Perna and Malizia (Tr. 910-13).

Approximately two weeks later, Malizia told Perna he had again spoken with Galina, and had proposed to pay Galina 10% of the first $100,000 and 5% of the balance if Galina would help to get the debt paid (Tr. 913-14). When no additional moneys were forthcoming, Perna and Malizia met Galina in the interview room at the jail. Galina said he had seen Lucas several times, and Lucas had said he would deliver the money, but had not done so. Malizia then asked Galina if it were possible to liquidate Lucas' assets. Galina said that this was beyond his power unless Lucas agreed (Tr. 914-15).

On September 22, 1974, Perna and Malizia escaped from the detention center. Perna was recaptured a few weeks later. Malizia remains a fugitive (Tr. 916-19).

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* The Court informed the jury that at this time Lucas was under arrest and confinement for charges of which he was later acquitted (Tr. 586).

16. Lucas is arrested and $584,705 is seized from his residence

On January 28, 1975, Lucas was arrested at his residence at 933 Sheffield Road, Teaneck, New Jersey. Agents of the DEA, pursuant to a search warrant, seized $584,705 in cash from inside the residence and outside the bathroom window adjacent to the residence. They also seized several hundred clear plastic bags contained in a suitcase, and a heat sealing machine which was capable of sealing them (Tr. 2877-88; 2963-73; GX 101-108).

Perna had testified that as of January 1975 Lucas owed him $285,000 for heroin previously purchased (Tr. 1327).

B. The Defendants' Case

De Lutro, Gwynn,* Lucas and Soldano presented evidence in defense. Magnano, Pallatta, Bolella and Chapman did not.

1. De Lutro

De Lutro testified (Tr. 3220-3241) that he had known Verzino for about 15 years but had never had any narcotics transaction with him, Perna or Malizia (Tr. 3221-3222). He said he acted as a manager for the owner of Raymond's Restaurant, where Verzino testified he discussed narcotics with De Lutro (*supra*, pp. 12-13), with the understanding that he would be on the payroll if the restaurant ever broke even, which it never did (Tr. 3237-40). De Lutro said that in late January 1974, Verzino

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* Gwynn, whose appeal has been dismissed (*supra*, p. 1 n. *), testified in substance that he had refused involvement with any of the narcotics transactions proferred by others, and that Perna was trying to frame him because Perna did not like Puerto Ricans (Tr. 3536-3559).

had come into Raymond's Restaurant and accused De Lutro of having an affair with his wife, whom De Lutro knew. When De Lutro told Verzino that Verzino was blowing his top, Verzino threatened him and walked out (Tr. 3232-3237). This was supposed to provide Verzino with a motive to frame De Lutro.

De Lutro also called as witnesses, Rodario Oddo, Andrew Risoli, Murray Zimmerman, Maryann Fazio, Edward Fazio and Jerome Rosenberg. The first five of these testified to a commotion about Verzino's wife between De Lutro and Verzino at Raymond's Restaurant in late January 1974 (Tr. 2988-2995, 3030-3035, 3049-3053, 3102-3105, 3119-3123).* Rosenberg, who was convicted in 1962 for the murder of two policemen and was serving a life sentence (Tr. 3129-30), testified that on March 4, 1974, while he was incarcerated at Ossining State Prison, he met Verzino in the prison law library where he worked. Verzino, he said, told him he was going to frame De Lutro in a narcotics case because De Lutro had been associating with Verzino's wife. Rosenberg was sure the date was March 4 because he had made out an interview slip showing that he had met Verzino on that date (Tr. 3149-56). On cross-examination, Rosenberg said he was framed on the murder charge and was innocent of it, and reiterated that he knew March 4, 1974 was the exact date Verzino told him he was going to frame De Lutro in a narcotics case (Tr. 3169-75).**

2. Lucas

Lucas did not testify, but presented the testimony of John D. Mc Connell and Martha M. Lewis.

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* Verzino denied ever having had an argument about his wife with De Lutro (Tr. 2388-2389).

** Verzino denied ever having met Rosenberg in his life (Tr. 2381-84).

Mc Connell, an attorney from Raleigh, North Carolina, testified he had previously represented Lucas in two North Carolina real estate transactions, during which he observed that Lucas had a habit of generating large sums of cash by cashing checks (Tr. 3544-15).

Lewis, an attorney from California, testified that she was introduced to Lucas in Las Vegas by her husband, Joe Lewis, the former professional boxer, and that during the past several years Lucas had won large sums of money in Las Vegas as a professional gambler (Tr. 3527-32).

3. Soldano

Soldano also did not testify, but offered a stipulation concerning his identification (Tr. 3643-44).

C. The Government's Rebuttal Case

The Government presented one rebuttal witness, Reginald Lee, an employee of the New York City Department of Correction. Lee testified that Verzino was not transferred to Ossining State Prison until March 5, 1974, the day after the alleged conversation there with De Lutro's witness, Rosenberg, in which Verzino was supposed to have said he was going to frame De Lutro in a narcotics case (Tr. 3646-49).

ARGUMENT

POINT I

The jury properly found a single conspiracy among the appellants and their co-conspirators to distribute narcotics.

Appellants urge reversal of their convictions on the ground that the proof at trial established the existence of multiple conspiracies rather than the single conspiracy charged, and contend that the trial court erred in not granting severances. Additionally, De Lutro and Lucas contend that the trial court's jury instructions on the question of multiple conspiracies were inadequate and confusing. The contentions are wholly without merit.

A. Single conspiracy

Viewed in the light most favorable to the Government, there clearly was more than ample evidence from which the jury could properly have found the existence of a single, classic chain conspiracy, consisting of suppliers, middlemen and customers, whose common purpose was the distribution of large amounts of narcotics "into the hands of the ultimate purchasers." *United States* v. *Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

In the course of approximately 10 months, the middlemen and "core group" of this conspiracy (*ibid.*), Perna, Ernest Malizia and Verzino, purchased from three sources of supply—appellants Pallatta, Magnano and Bolella, in one group, and each of appellants De Lutro and Soldano —approximately 140 pounds of heroin, which the core group thereafter redistributed, on a recurrent basis and in large amounts, to its customers, including appellant Lucas. The evidence makes clear that each of the

complaining appellants—all of whom dealt directly with the core operators in supplying or buying multi-kilogram quantities of heroin—was aware that he was a participant in a large scale scheme designed to place narcotics in the hands of its ultimate users. *United States* v. *Rich*, 262 F.2d 415, 418 (2d Cir. 1959).

Thus, Perna and Malizia formed an illicit partnership and began in March 1973 to buy diluted heroin from Pallatta, Magnano and Bolella, and continued to do so on numerous occasions in massive amounts totalling approximately 120 pounds until January 1974. They sold these narcotics, after diluting them further, to Lucas, Gwynn and others during this period of time.

In September 1973 Verzino joined the Perna-Ernest Malizia partnership. In November 1973, through Verzino's initiative, he and his partners bought approximately five kilos of pure heroin from De Lutro for $250,000 in cash—money generated by earlier sales of heroin received from Pallatta, Magnano and Bolella (Tr. 1871-75, 1935-62). De Lutro, the evidence showed, was aware that the core group was already actively engaged in narcotics trafficking at the time he sold them heroin.*

The heroin so obtained was sold by the core group to Lucas and others, along with heroin the core group was buying at the same time from Pallatta, Magnano and Bolella (Tr. 1994-95, 2004-08).

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* Aside from the fact that this $250,000 cash sale by De Lutro would itself provide sufficient basis for the jury to conclude that De Lutro had "some knowledge" of the larger common goal of the conspiracy, *United States* v. *La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975), De Lutro's claim that the evidence against him was limited to that of this single sale is in error. The evidence established that this sale was only the first of several intended sales of heroin De Lutro stated he would make to Verzino, Malizia and Perna (Tr. 1940-62).

On the other hand, Pallatta and his partners were aware that the core group had bought five kilos of heroin from another source with money that was owed to him and his associates for sales of heroin. After they learned this, they sold an additional 12 kilos of diluted heroin to the core group (Tr. 765-75, 1997-2000).

In or about November 1973 at a meeting among Ernest Malizia, Perna, Verzino, Joseph Malizia, Ernest's brother, and others, Ernest Malizia told his brother Joseph that he could become a partner in the narcotics business with Ernest, Perna and Verzino if he could secure pure heroin for them. In pursuit of this goal, Joseph Malizia introduced Verzino to Soldano in late January 1974 and Verzino and Perna bought three kilos of pure heroin from them for approximately $150,000, which were also to be sold to their narcotics customers (Tr. 822-29, 2009-12, 2012-33).*

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* Soldano claims in error that as the proof showed only that he sold heroin to the core group on only one occasion, there was insufficient evidence to link him to the conspiracy. *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), *cert. denied* in *Genovese* v. *United States*, 362 U.S. 974 (1960). His argument ignores the fact that his one sale was of three kilos of pure heroin worth $3,000,000 at street level (Tr. 1569), and that the parties to this transaction regarded it as only the first of a series of such transactions by which the core group would acquire a steady source of pure heroin (Tr. 826-28). In any event, as with De Lutro, the transaction actually consummated was certainly sufficient to establish Soldano's knowledge that he was dealing with a well organized narcotics trafficking ring. Clearly, Soldano was aware that Verzino was not buying this heroin for personal use, but for re-sale to others. *United States* v. *Mallah*, 503 F.2d 971, 976 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). Further, Soldano's partner in this transaction was Joseph Malizia, who was aware that Verzino, Perna and his brother, Ernest Malizia, were in the narcotics business, and who wished to join them as a partner. The jury was entitled to attribute his knowledge to Soldano. Cf. *United States* v. *Bernstein*, Dkt. No. 74-2328 (2d Cir. March 4, 1976) slip op. 6631, 6659.

[Footnote continued on following page]

Lucas and Gwynn purchased from the core group much of the heroin which was obtained from Pallatta and his partners, Magnano and Bolella. Lucas also purchased pure heroin obtained by the core group from De Lutro.* The direct evidence made clear that Lucas was aware that the heroin he was buying from the core group was coming from others. (Tr. 2004-08).

With such a factual pattern, this Court on numerous occasions has affirmed a jury's finding that the proof established the single conspiracy charged. *United States* v. *Ortega-Alvarez*, 506 F.2d 455, 457 (2d Cir. 1974),

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The single transaction rule is only applicable "when there is no independent evidence tending to prove that the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge may be inferred." *United States* v. *Agueci, supra*, 310 F.2d at 836. Soldano's role here was not that of a minor buyer of heroin from a member of the conspiracy. See *United States* v. *Tramunti*, 513 F.2d 1066, 1111 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3201 (Oct. 6, 1975). His sale of three kilos of pure heroin was one of the largest and most expensive single purchases of heroin the core group made. This being so the "qualitative nature" of his actions, when viewed in the context of the whole conspiracy, was sufficient to establish his connection to it. *Id.*, *United States* v. *Torres*, 503 F.2d 1120, 1124 (2d Cir. 1974); *United States* v. *Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Finally, back in November, when Ernest Malizia told his brother Joseph to get pure heroin, Joseph said he would see someone from "downtown" (Tr. 2011). Verzino, the night he took delivery of the heroin from Soldano in late January, 1974, met him in "downtown" Manhattan (Tr. 2034-42). This proof permitted the inference that in November, 1973 Joseph Malizia had a narcotics relationship with Soldano.

* Both Lucas and De Lutro primarily base their arguments on multiple conspiracies on the claimed fact that Lucas did not receive from the core group any of the pure heroin this group bought from De Lutro. Lucas' Brief at 24; De Lutro's Brief at 18. They are both mistaken on the facts. Verzino specifically testified that he and Perna sold Lucas a quantity of this pure heroin (Tr. 2004-06).

cert. denied, 421 U.S. 910 (1975); *United States* v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, 419 U.S. 827 (1974); *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *United States* v. *Agueci*, *supra*. Indeed, this Circuit has found a single conspiracy in cases with far less compelling fact patterns than here. *E.g.*, *United States* v. *Tramunti*, *supra*; *United States* v. *Mallah*, *supra*. As this Court said in *Bynum*, *supra*, 485 F.2d at 497:

> "While some of the suppliers may not have known the identity of other sellers, the inference was justified that each knew his supplies were only a small part of the raw drugs which the extensive Bynum-Cordovano operation processed and sold. See *Blumenthal* v. *United States*, 332 U.S. at 554-555 n.14. In view of the large amounts of hard drugs involved and the large amounts of money advanced to suppliers, there is no question but that the Bynum-Cordovano partnership was conducting *a regular business on a steady basis with numerous suppliers* who intentionally and knowingly were either looking to or maintaining a close relationship with a solvent ongoing apparatus."

Similarly, as to a buyer such as Lucas,

> "It is firmly settled in this Circuit that when large quantities of heroin are being distributed, each major buyer must be presumed to know that he is part of a wide-ranging venture, the success of which depends on the performance of others whose identities he may not even know."

United States v. *Ortega-Alvarez*, *supra*, 506 F.2d at 457. See *United States* v. *Steinberg*, 525 F.2d 1126, 1133 (2d Cir. 1975); *United States* v. *Mallah*, *supra*, 503 F.2d at 983-84; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1106; *United States* v. *Sperling*, 506 F.2d 1323, 1340-43 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). *See also United States* v. *Sir Kue Chin*, Dkt. No. 75-1227 (2d Cir. April 21, 1976).

Appellants' reliance on *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), and *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), is misplaced.

Miley involved the question whether the value and quantity of the drugs there sold, LSD and THC in relatively small dollar amounts, permitted the inference, allowed in those cases above cited dealing with large amounts of narcotics worth hundreds of thousands of dollars, that different suppliers to the same group knew that others were performing the same role. *United States* v. *Miley*, *supra* at 1207. The Court there answered the question in the negative, finding that there was insufficient evidence that the core group was "conducting what could be seriously be called a 'regular business on a steady basis' ".

This case is also totally unlike the facts depicted in *Bertolotti*. In *Bertolotti*, this Court found that although the indictment had charged a single conspiracy, the proof had established at least four separate, distinct and unrelated narcotics and quasi-narcotics ventures (some of which were in reality cash and narcotics rip-offs), only one of which "resembled the orthodox business operation we have found to exist in narcotics conspiracies." 529 F.2d at 155. The Court further found that the transactions "could hardly be attributed to any real organization, even 'a loose-knit one,' " and that there was no evidence which revealed "what could seriously be called 'a regular busi-

ness on a steady basis.'" *Ibid.* It concluded that reversal was required because of the risk that the appellants therein had been prejudiced by the spillover of proof of those conspiracies with which they had had no connection.

Here, as previously noted, the proof established that all suppliers, as well as Lucas, were aware of the larger scope of the narcotics activities of the core group, and knowingly and intentionally joined those activities for massive profit. Further, unlike the situations in *Miley* and *Bertolotti*, the core group here purchased and sold on a continuous basis massive amounts of heroin, both pure and diluted. To suggest that their activities did not amount to a "regular business" ignores the record of their actions.

B. The trial court's charge on multiple conspiracies was consistent with the law.

De Lutro attacks here for the first time the trial court's charge on multiple conspiracies as confusing and inadequate and contends that the jury should have been instructed as to his limited involvement.* His argument assumes that the court charged the jury with the prejudicial "all or nothing charge" condemned by this Court in *United States* v. *Borelli*, 336 F.2d 376 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965), which it did not.

The trial court's charge on multiple conspiracies, much of which is ignored in De Lutro's argument, was as follows:

> "Let me take up the subject of multiple conspiracy. Some of the defendants have contended

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* De Lutro's failure to object below to this portion of the court's charge precludes review in this Court of the alleged ground of error. *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975).

hat the government's proof fails to show the existence of the one overall conspiracy which this indictment charges. They argue that no conspiracy existed, or if in fact one did exist then at best the evidence shows several separate and independent conspiracies involving various groups of the defendants.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single conspiracy which the indictment charges.

So what you must first do is to determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find no such conspiracy existed then you acquit. However, if you are satisfied that such a conspiracy existed you must determine who the members were of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, you must acquit that defendant.

In other words, to find a defendant guilty you must find that he was a member of the very conspiracy charged in the indictment and not in some other conspiracy.

In determining whether a given conspiracy exists you may consider what the evidence shows as to the changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy continued to be those charged in the indictment.

> The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship.
>
> If you decide that the conspiracy charged in the indictment existed between any of the defendants you must then decide as to each defendant individually whether he joined the conspiracy with knowledge of any of its purposes.
>
> In determining whether any defendant was a party each is entitled to individual consideration of the proof respecting him, including any evidence of his knowledge or lack of knowledge, his status as a partner, or supervisor, his participation in key conversations, his participation in the plan, scheme, or agreements alleged." (Tr. 4076-78)

Simply put, this was not the "all or nothing charge" but the charge upheld in substance in *United States* v. *Bynum*, *supra*, 485 F.2d at 490, 497 and *United States* v. *Tramunti*, *supra*, 513 F.2d at 1087, 1107-08. See *United States* v. *Cohen*, 518 F.2d 727, 735 (2d Cir. 1975).*

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* This Court recently approved jury instructions in a multi-defendant case on the issue of multiple conspiracies which were far less specific than those provided by the District Court here. *United States* v. *Bernstein*, *supra* at 6662 & n.12.

Moreover, it is De Lutro's request to charge on this point which is confusing, inadequate and similar to that condemned in *Borelli* as the "all or nothing charge." Compare De Lutro's Brief at 24 with *United States* v. *Borelli*, *supra*, 336 F.2d at 382-86. Accordingly it was entirely proper for the trial court to decline to grant the proffered instruction. *United States* v. *Leonard*, 524 F.2d 1076, 1084 (2d Cir. 1975).

C. Severance

As the proof permitted the jury to find the existence of a single conspiracy to distribute heroin, the refusal of the trial court to grant severances was correct. *United States* v. *Bynum*, *supra*, 485 F.2d at 497.

Even assuming, *arguendo*, that several conspiracies were proven, the complaining appellants are still not entitled to reversal since, notwithstanding their conclusory protests to the contrary, they were not prejudiced by the misjoinder.* *United States* v. *Miley*, *supra*, 513 F.2d at 1207. "The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 259

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* De Lutro's brief states that he was prejudiced by "highly inflammatory evidence unrelated to his case. . . ." De Lutro's Brief at 19-20. For this proposition he cites to the trial transcript at 1488-94. This is the testimony of Agent Bradley regarding the eight kilos of heroin which were seized from Perna at the time of his arrest on February 1, 1974. Regarding this heroin Perna testified that he made these kilos up from pure heroin which he and his partners received from De Lutro or Soldano (Tr. 1194-95). Consequently, the introduction of this evidence was directly related to the Government's proof against De Lutro which was relevant in establishing his participation in a single conspiracy.

U.S. 78, 82 (1935); *accord, United States* v. *Sir Kue Chin, supra; United States* v. *Miley, supra,* 513 F.2d at 1207-1209.*

The major claim of prejudice here is that the proof against one set of co-conspirators had a spill-over effect on others that would not have existed had there been separate trials. But this was not a case in which relatively minor participants were joined with major violators against whom there was such proof that the minor defendants would be swept away with the tide. *United States* v. *Miley, supra,* 513 F.2d at 1209. The proof established that each appellant was either a large scale distributor of heroin or an equally significant purchaser. De Lutro received $250,000 in cash for the five kilos of pure heroin he sold and hoped to sell much more; Soldano received approximately $142,000 for the three kilos of pure heroin he sold; Pallatta, Magnano, Bolella and their partners received in excess of one-half million dollars for the multi-kilos they sold; and Lucas paid over $1,000,000 for heroin he bought.** All of the proof pertained to the purchase and sale of large amounts of heroin, with the single exception of Lucas' purchase of two kilos of cocaine from the core group. There was no proof of violent

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* Whether the argument is misjoinder under Rule 8 of the Fed. R. Crim. P. or failure to grant a severance under Rule 14, the test is whether substantial prejudice resulted from the joint trial. *Schaffer* v. *United States,* 363 U.S. 511, 513 (1960); *United States* v. *Miley, supra,* 513 F.2d at 1207.

** The only arguably minor defendant was Chapman, as to whom the jury was unresolved. The proof against Chapman was that he was instrumental in introducing Perna and Malizia to Lucas. The absence of a guilty verdict as to Chapman strongly suggests that the jury carefully considered the evidence against each defendant and swept no one away with the tide. *Cf. United States* v. *Papadakis,* 510 F.2d 287, 300-301 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975). Chapman was shot to death on March 13, 1976.

activity, except that which involved the Government's own witnesses.

Finally, there was no hearsay evidence at trial emanating from a member of one of the alleged conspiracies used to the detriment of a member of another. *United States* v. *Miley*, *supra*, 513 F.2d at 1208.

In sum, appellants' arguments as to prejudice amount solely to a contention that they stood a better chance of acquittal if tried alone, a claim which has been specifically rejected as a standard of prejudice. *United States* v. *Finkelstein*, 526 F.2d 517, 523 (2d Cir. 1975); *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972); *United States* v. *Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

POINT II

The evidence of prior similar crimes was properly admitted.

Pallatta, Magnano, De Lutro, Bolella and Lucas contend that Verzino's testimony concerning prior similar crimes committed by some of them was error and so inflamed the jury against them that they are entitled to a new trial. This argument is totally lacking in merit.

It is settled that evidence of other crimes is admissible if introduced for any purpose other than to show the defendant has a bad character or is a bad person. *E.g.*, *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir., January 12, 1976) slip op. 6577, 6582; *United States* v. *Leonard*, *supra*; *United States* v. *Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3358 (December 15, 1975); *United States* v. *Eliano*,

522 F.2d 201 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967); Rule 404(b), Federal Rules of Evidence. In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potentially prejudicial effect. This question is addressed to the sound and broad discretion of the trial court, whose determination is entitled to great weight. *United States* v. *Santiago*, *supra*; *United States* v. *Leonard*, *supra*, 524 F.2d at 1080; *United States* v. *Brettholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). That discretion was properly exercised here.*

A. The proof of similar acts.

Verzino testified that he had been incarcerated from 1966 to August 24, 1973 in federal prison (Tr. 1859). After leaving prison in 1973, he almost immediately began narcotics negotiations with Malizia, Perna, Pallatta, Magnano, De Lutro and Bolella to become a member of their heroin distribution group. To explain how it was that Verzino had no difficulty locating these men, beginning negotiations with them, and then arriving at narcotics arrangements with the individuals and the group, it became necessary to explain the origins and

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* In this regard, it should be noted that the district court did not lightly decide to admit such proof. When the Government sought to have Anthony Manfredonia testify that on three occasions prior to 1973 he purchased pure heroin from Pallatta, Bolella and their partners, the court excluded this evidence. (Tr. 2923-27).

background of this conspiracy. See *United States* v. *Natale*, 526 F.2d 1160, 1173-74 (2d Cir. 1975); *United States* v. *Torres*, 519 F.2d 723, 727 (2d Cir. 1975); *United States* v. *Papadakis*, *supra*, 510 F.2d at 294; *United States* v. *Colasurdo*, 453 F.2d 585, 591 & n.3 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

Verzino testified that from 1959, when he first began dealing in heroin, until his imprisonment in 1966, he had narcotics transactions with Magnano, Pallatta, Bolella and De Lutro involving multi-kilo quantities of high quality heroin (Tr. 1865). Specifically, in 1959 and 1960 Verzino purchased heroin from Magnano and Pallatta (Tr. 1866-67). In 1962 he introduced Bolella and Pallatta to a person known as Joe Ragone, a heroin connection, and they subsequently trafficked in narcotics with him (Tr. 1867-68). Further, in 1960 and 1961 Verzino and Magnano were buying heroin from Pallatta and then selling it in partnership to a specific customer (Tr. 1870).* Verzino's prior relationship with De Lutro was based on several narcotics transactions from 1961 or 1962 to 1965 involving multi-kilo lots of pure heroin (Tr. 1993-94).

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* Verzino also testified on redirect examination that he was introduced to heroin when Magnano showed him a small amount in the late 1940's but there was no transaction (Tr. 2574-76). Lucas places great emphasis on this testimony, claiming that it shows how far afield the Government was willing to go with similar act proof. We note first that these two pages of testimony were the only reference to events prior to 1959 which the Government adduced. Second, this testimony did not concern a sale; Magnano simply showed Verzino a heroin capsule. (Tr. 2574-76). Third, this proof—showing an over 25 year relationship between Magnano and Verzino—was admissible to explain Verzino's immediate acceptance into the conspiracy after 7 years in prison by Magnano and his partners.

It is the foregoing testimony of Verzino on which appellants base their principal attack on the admission of similar act proof.*

B. The similar act proof was properly admitted

Verzino's testimony with respect to prior narcotics dealings established that Pallatta, Magnano, Bolella and De Lutro had been in the business of dealing in large amounts of heroin since the beginning of the 1960's. If the Government had been precluded from having Verzino testify as to prior dealings which necessarily occurred before he was incarcerated in 1966, his testimony regarding his conversations with the appellants after his release from prison would have been at the very least incomprehensible to the jury and, at the worst, simply unbelievable. This is so because in each of his initial conversations with Pallatta, Bolella, Magnano and De Lutro there were almost immediate references to the narcotics trade, the current price of heroin or how high it had risen.** Without specific evidence establishing

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* Lucas also argues that it was error to permit Mario Perna to testify that during a meeting with Lucas in August, 1973 Lucas asked Perna and Malizia to assist him in getting back $60,000 which Lucas had paid to a person named Al Rossi for the purchase of cocaine because Rossi had taken the money and not supplied the cocaine (Tr. 589-91). This claim is frivolous. This conversation was intermingled with, related to and based upon other conversations and events directly related to the conspiracy charged, and was therefore in furtherance of the conspiracy and part of the *res gestae* proof. (See Tr. 701-02). The same is true of Verzino's testimony relating a conversation he had with Bolella in approximately October, 1973 during which Bolella referred to his previous narcotics relationship with a named third party about which Lucas is the only appellant to complain.

** During Verzino's first meeting with Pallatta after his release, Pallatta told him that while he was in jail, the heroin business had changed considerably: The price of heroin had risen, and many traffickers were being arrested (Tr. 1851-58).

[Footnote continued on following page]

Verzino's prior dealings with appellants before he went to prison, his testimony would have lacked essential background, and his entrance into the conspiracy and his almost immediate acceptance in the conspiracy by the appellants and other co-conspirators would have lacked believability. *Cf. United States* v. *Papadakis*, *supra*, 510 F.2d at 294-95.

Furthermore, this evidence was admissible, because it reflected "a pattern of conduct of which the crime charged [was] a part." *United States* v. *Blassingame*, 427 F.2d 329, 331 (2d Cir. 1970), *cert. denied*, 402 U.S. 945 (1971). The evidence, which came in under limiting instructions by the court, was relevant to show that these appellants were "continuing along the same line" in receiving and distributing the multi-kilo quantities of heroin alleged in the Indictment. *United States* v. *De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (2d Cir. 1972), *cert. denied*, 410 U.S. 909 (1973).

In *Papadakis* this Court held:

> "The charge of conspiracy to commit criminal acts always requires proof of a course of conduct that

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During Verzino's first meeting with Bolella after his release, they quickly entered into a discussion concerning the possibility that, while Verzino was in custody, Bolella had obtained heroin which Verzino's associates were importing from France. Bolella also expressed his fear to Verzino that while he was in Florida, his voice had been picked up by a wiretap (Tr. 1916-23).

During Verzino's first meeting with Magnano after his release they immediately discussed the possibility that Magnano and his partners would buy cocaine from Verzino (Tr. 1913-15).

During Verzino's first meeting with De Lutro they exchanged greetings and they immediately discussed the going rate for pure heroin with De Lutro saying that the price was currently high. (Tr. 1931-35).

will circumstantially proof the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes." 510 F.2d at 294-95.*

On the other side, the chances that the jury would be aroused by the evidence—contained in no more than 10 pages of an over 3000 page record—to the prejudice of the defendants was minimal. The impact of the con-

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* Indeed, in successfully arguing the inadmissibility of certain other similar act proof at trial, trial counsel for Bellatta, in referring directly to Verzino's similar act testimony, conceded its admissibility:

> "Mr. Goldberg: Could I say something? You have had a long day, but I just want to show you how this argument lifts itself by its own bootstraps.
>
> You had admitted already other crimes under an exception that you found, *quite properly*, from the Court of Appeals.
>
> Now, he wants to bring in a witness to corroborate what another witness has said whose testimony you let in *only because it came within the rule of the Court of Appeals.*
>
> Now, this Manfridonia testimony will be offered not because of any exception delineated by the Court of Appeals, *because it is Verzino's testimony about other crimes that you let in because it comes within the Court of Appeals rule.* Now he wants to bring in another witness who doesn't come within the guidelines laid down by the Court of Appeals, but now he [says] only to show and corroborate what Verzino has said.
>
> In other words, he is adding an additional link to what the Court of Appeals said is the proper way to get the proof in.
>
> *You ruled to my dismay, quite properly under the Second Circuit decisions. I don't like the Second Circuit decisions, but I am stuck with them.* So be it. But having absorbed those blows, he now comes back to you and says, 'Wait a minute. Now I've got you on point one, the Court of Appeals decision, you are going to have to let me have other links to corroborate.'" (Tr. 1985-86) (emphasis supplied).

cedely admissible evidence of distribution of over 150 pounds of heroin during the period of the conspiracy charged "was not likely to be significantly augmented" by evidence that narcotics had been received and sold in the past by the same people. *United States* v. *Bozza*, 365 F.2d 206, 214 (2d Cir. 1965).

Appellants' reliance in support of their position on *United States* v. *De Cicco*, 435 F.2d 478 (2d Cir. 1970), and *United States* v. *Byrd*, 352 F.2d 570 (2d Cir. 1965) is entirely misplaced. These cases hold that prior similar act testimony adduced for the purpose of showing the intent of the defendants had been improperly admitted when it was clear that intent had not been in issue or that intent had already been clearly established. *United States* v. *De Cicco*, *supra*, 435 F.2d at 483-84; *United States* v. *Byrd*, *supra*, 352 F.2d at 574. The Government here did not offer testimony concerning prior similar acts for the purpose of establishing intent. The offer was made to show the background and development of the conspiracy, including Verzino's acceptance by the defendants and his acceptance of them. As such, unlike the situation in *Byrd*, "the government was faced with a real necessity which required it to offer the evidence in its case." *United States* v. *Byrd*, *supra*, 352 F.2d at 575.

Magnano, Pallatta and Bolella also claim that the Government improperly used the prior similar act testimony to attack the character of the defendants in summation. (Magnano-Pallatta Br. at 46; Bolella Br. at 43). They base their claim on the following remarks which have been wrenched completely out of their proper context in the Government's summation:

> "We have never disputed in this case from the beginning until now those men are not of a bad background. But who, members of the jury, do major narcotics and heroin salesmen associate

> with? Who do they associate with? With others of the same ilk. That is why this association is important in this case. Just as Verzino and Perna sold heroin in the past, their association with these other people corroborates the fact that they are of the same ilk, and Verzino and Perna . . ." (Tr. 3751-52).

These remarks had nothing to do with the prior similar act testimony. Nor were they an attack upon the character of the defendants. They were designed to convince the jury that the Government's proof of prior association of some of the defendants with Perna and Verzino, by means of documents, corroborated their testimony and that the jury should find that the defendants were narcotics traffickers just like the witnesses.

When the remarks immediately preceding those lifted out of context are read, this becomes plain:

> "Also found on Verzino's person at the time of his arrest was Government's Exhibit 37, of which this is a blowup, 37-A. Teaneck, 933 Sheffield Road, the address of Frank Lucas. Also on Verzino's person at the time of his arrest was Government's Exhibit 36, which Rollo seized from him, a customer list. Verzino testified that the Moose here referred to Frank Lucas, and the figure next to it is 310, the same figure that Mario Perna had down on his customer list with respect to Frank.
>
> There is also a reference here on 36-A to 4. Verzino testified it reflected the defendant Hohn Gwynn and what he owed at the time, just as the Moose reflected what Lucas owed at the time of Verzino's arrest, February 25, 1974.

Government's Exhibit 42-A in evidence is a blow-up of a customer list that Frank Rivello [sic] had in his possession when he was seized by Sergeant Rollo. These documents were admitted at a time when you were not present. This has the defendant's names spelled out almost to a T. It is identical with the customer list that Verzino had on his person at the time of his arrest, with the exception of the entry as to Moose. The other figures and the other names are identical. With respect to Gwynn, he has it spelled G-y-n-n. Is Caravella in on the frame also?

These documents, members of the jury, and the phone lists show more than just that Verzino was keeping the names of some of these defendants in code. They show, members of the jury, association, prior association between Verzino and these defendants. Why is this significant? Mr. Goldberg and the other attorneys will speak to you after I am through. They are going to say that Verzino and Perna are the scum of the earth, that they should not be believed based on their own admissions that they are the scum of the earth, that they sell heroin, that Perna wanted to kill Verzino twice, that they are terribly bad men, and that they can't be believed because they are bad fellows, degenerates, and that will be the argument in substance.

We have never disputed in this case from the beginning until now those men are not of a bad background. But who, members of the jury, do major narcotics and heroin salesmen associate with? With others of the same ilk. That is why this association is important in this case. Just as Verzino and Perna sold heroin in the past, their association with these other people corroborates

the fact that they are of the same ilk, and Verzino and Perna . . ." (Tr. 3750-52).*

Moreover, there was not one reference anywhere in the Government's two summations to the similar act testimony. There can be no clearer proof that the Government was interested in utilizing this testimony only to show the development of the conspiracy and the roles of the parties and not to prove propensity to commit crimes.**

Finally, appellants' attacks on the court's limiting instructions and final charge with respect to the similar act proof were never launched below.*** This fact is not

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* This argument was perfectly permissible. See, *e.g.*, *United States* v. *Diggs*, 497 F.2d 391, 393-94 (2d Cir. 1974), *cert. denied*, 419 U.S. 861 (1975).

** Bolella quotes a portion of a Government memorandum in support of the introduction of Anthony Manfredonia's proposed testimony that he had bought pure heroin from Pallatta and Bolella on three occasions prior to 1973 in support of his argument. (Br. at 41-42). He claims that the memo demonstrates that the Government conceded that the prior similar act testimony had no probative value. But this is simply not what the memo says. It says, correctly, that Verzino's testimony concerning similar acts did not prejudice the defendants any more than his testimony concerning events in 1973 and 1974, cf. *United States* v. *Bozza*, *supra*, 365 F.2d at 214, because whatever he said was subject to the jury's finding on his credibility. This is a far cry from saying that the evidence did not show essential background which placed Verzino's testimony concerning 1973 and 1974 in the proper context so that it would not be rejected out of hand by the jury.

*** Lucas asserts that the Court gave confusing and contradictory limiting instructions *over his objection*. (Lucas Br. at 19). What the record shows, however, is that although Lucas did not want a limiting instruction, his co-defendants did (Tr. 613-14). Further, the reason Lucas did not want the limiting instruction was not that he thought it was confusing, as he now asserts, but because there was a possibility that the court would later strike the testimony to which the instruction related (Tr. 613). Finally, the testimony had nothing to do with events occurring prior to the

[Footnote continued on following page]

only indicative of the insubstantiability of the claims now being raised on appeal, but also constitutes a waiver of the issue. See *United States* v. *Bermudez*, 526 F.2d 89, 98-99 (2d Cir. 1975); *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974); *United States* v. *Carson*, 464 F.2d 424, 432 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); Fed. R. Crim. P. 30. In any event, the limiting instructions were adequate and the court's final charge to the jury carefully instructed them only to consider the testimony in determining the background and the development of the conspiracy which was a proper instruction under *United States* v. *Papadakis*, *supra*.*

POINT III

The $584,705 in cash seized from Lucas' home was properly admitted into evidence.

Appellants contend that the trial court committed reversible error by permitting the Government to introduce $584,705 in cash, which was seized from Lucas' home on January 28, 1975, the day of his arrest, pursuant to a search warrant.** They argue that there was no con-

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charged conspiracy but related to Perna's testimony that Lucas told him Lucas had been "ripped-off" by Rossi for $60,000 (Tr. 592-613) in connection with a cocaine deal, which was in any event a statement by Lucas in furtherance of the conspiracy (See, *supra*, p. 44, n.*).

* Bolella's counsel noted an exception to this portion of the charge "as set forth in the record by me earlier" (Tr. 4122-23). Counsel was, however, simply reiterating his objection to the introduction of the proof itself which is made clear by the fact that when, prior to the charge, the court told all counsel of its proposed charge on prior similar acts, no one took exception. (Tr. 3665-66).

** Lucas' pre-trial motion to suppress this money and other items seized was denied. He claims no error with respect to the denial of that motion.

nection between the Government's proof of a narcotics conspiracy and the seizure of the cash and that therefore the evidence was irrelevant. Their arguments ignore the record.

Lucas' possession of this cash was specifically charged as overt act number 24 of the conspiracy count. The relevancy of the seizure was quite plainly that, when the last of the core group partners, Verzino, was arrested on February 25, 1974, the proof showed that Lucas owed $310,000 to the core group for massive amounts of heroin previously purchased. Thereafter, in May or June, 1974, Perna and Malizia met with Lucas in jail and Lucas agreed to pay them the money he owed.* After Lucas was released he paid $25,000 through his attorney, Gino Galina (Tr. 886-88, 910-913). Moreover, Perna and Malizia while in custody during the summer of 1974 continued their efforts to collect the balance of the moneys owed them by Lucas, $285,000 (Tr. 914-19). Perna testified that as of January 1975, Lucas still owed him $285,000 (Tr. 1327). Perna also testified that while he was selling heroin to Lucas he was calling him at his residence, the same location from which the cash was seized (Tr. 861, 870-71, 2875-76).

Out of a total of $584,705 seized, approximately $274,000 in cash, contained in bags, was seized from outside the first floor bathroom window adjacent to the master bedroom of Lucas' house. The rest of the cash was seized from various locations in the house. In addition to the cash, the court also admitted into evidence several

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* Lucas was temporarily incarcerated on another narcotics charge at the time. The jury was told, on request of Lucas' attorney, that Lucas was later acquitted on the charge for which he was then in custody. The jury was not informed that it was a narcotics charge. (Tr. 882-86).

hundred clear plastic bags, a heat sealing machine designed to seal the plastic bags and a bottle of lactose, a diluting agent for heroin, all of which were seized from Lucas' residence along with the cash.* (Tr. 2877-88, 2963-73; GX 101-08). The clear plastic bags were approximately the same size as the bags containing ½ kilogram quantities of heroin seized from Perna and Verzino's stash at the time of their arrests.

From this proof, the jury could surely have found that the cash seized was generated from sales of heroin which Lucas received from the core group and for which Lucas had not yet paid in full. The seizure of the clear plastic bags, the heat sealing machine and the lactose, and the attempt to conceal approximately $274,000 in cash by placing it outside the house, certainly supported this inference.

Possession of large amounts of unexplained cash, "the lubricant of the narcotics trade", *United States* v. *Bynum*, 360 F. Supp. 400, 419 (S.D.N.Y. 1973), as established here, is relevant and admissible in connection with evidence of massive narcotics dealings to prove membership in, and the existence of, a narcotics conspiracy. *United States* v. *Tramunti*, *supra*, 513 F.2d at 1105; *cf. United States* v. *Jackskion*, 102 F.2d 683, 684 (2d Cir.), *cert. denied*, 307 U.S. 635 (1939). As this Court has observed, "it is not necessary that every piece of evidence should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get a new complexion from other facts which are proved and, in

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* The trial court refused the Government's offer to admit a quantity of cocaine found on the lawn of Lucas' residence (Tr. 2861-64), even though the proof established Lucas bought two kilos of cocaine from the core group. (Tr. 2861-64). The Government did not offer a gun which was also seized during the search. (Tr. 2861).

turn, may corroborate the conclusion which would be drawn from other facts." *Commonwealth* v. *Mulrey*, 170 Mass. 103, 49 N.E. 91, 94 (1898), *quoted with approval in United States* v. *Tramunti*, *supra*, at 1105.

The seizure of the cash and the other items and the attempt to conceal a large portion of the cash not only corroborated the testimony of Perna and Verzino that they had sold Lucas massive amounts of heroin for which he still owed them $285,000, but also was relevant in establishing that Lucas' participation in the conspiracy to possess and distribute heroin continued to the day of his arrest.*

And even assuming the conspiracy charged in the indictment had come to an end, it is well settled that evidence obtained by searches after the termination of a conspiracy is admissible to prove the previous existence of the conspiracy and membership in that conspiracy. *United States* v. *Bermudez*, 526 F.2d 89, 95-96 (2d Cir. 1975); *United States* v. *Mallah*, *supra*, 503 F.2d at 981; *see also Lutwak* v. *United States*, 344 U.S. 604, 617 (1953); *United States* v. *Tramunti*, *supra*, 513 F.2d at 1116; *United States* v. *Bennett*, 409 F.2d 888, 892 (2d Cir.), *cert. denied*, 396 U.S. 852 (1969).

In support of their theory that the cash related to another conspiracy and not the one being tried, defendants point to the Government's statement during the trial that it might attempt to introduce the cash in a subsequent trial in which Lucas was a defendant. They fail to note, however, that Lucas was not himself charged in the con-

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* "A conspiracy, once established, is presumed to continue until the contrary is shown . . ." *United States* v. *Cirillo*, 468 F.2d 1233, 1239 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Stromberg*, 268 F.2d 256, 263 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959).

spiracy count in the other case, and that it was the Government's position that the other indictment involved the same conspiracy being tried here; that is, it involved as defendants Lucas' narcotics partners, associates and customers, about whom there was little proof here (Tr. 2789, 2849, 3828-30). *See generally United States* v. *Mallah, supra*, 503 F.2d at 976. Consequently, the other indictment did not involve a separate conspiracy, as appellants misleadingly suggest, but one which was part and parcel of the conspiracy before the court.*

Appellants also contend that it was error to permit the introduction of the actual cash into evidence as its effect was so inflammatory that they were denied a fair trial. In *United States* v. *Kenny*, 462 F.2d 1205, 1219 (3d Cir.), *cert. denied* as *Murphy* v. *United States*, 407 U.S. 914 (1972), *cited with approval in United States* v. *Tramunti, supra*, 513 F.2d at 1105, $700,000 in bearer bonds belonging to one of the co-conspirators and approximately $50,000 in currency were admitted, in addition to evidence that one of the defendants controlled a bank account containing $1.2 million dollars. *See also United States* v. *Schwartz*, Dkt. No. 75-1364 (2d Cir., April 20, 1976) slip op. 3277, 3279.

Furthermore, despite defendants claims to the contrary, there is little, if any, difference between the introduction of the currency itself and photographs of it, as was the case in *Tramunti* with respect to approximately $1,000,000 in cash. In either case the jury was made aware of the existence of the money. Showing the "real"

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* The other indictment *United States* v. *Tutino*, et al., (75 Cr. 919), was subsequently tried before Judge Cooper. Lucas was charged as a defendant in substantive counts and was named only as an unindicted co-conspirator in the conspiracy count. The trial began on November 10, 1975 and resulted on December 23, 1975 in the acquittal of Lucas and twelve other defendants. During the course of the trial, the money seized from Lucas was admitted into evidence through photographs.

evidence to the jury simply made the testimony concerning the seizure more concrete. See *United States* v. *Stolzenberg*, 493 F.2d 53 (2d Cir. 1974).

Finally, after the trial court ruled that the cash was admissible, no defendant objected to the admission of the actual cash or advanced the suggestion that photographs were necessary (Tr. 2852-58, 2877-79, 2963). Failure to do so constituted a waiver of this issue. *Cf. United States* v. *Strassman*, 241 F.2d 784, 786 (2d Cir. 1957).*

POINT IV

The district court found as a fact that the Government's non-disclosure of three written statements by Government witness Perna was inadvertent. Its further findings that there was no significant chance that the information contained in the statements developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, was amply supported by the record, and its denial of the new trial motion was therefore entirely correct.

The law is well settled in this circuit that while an intentional suppression of *Brady* material will virtually mandate a new trial, an inadvertent non-disclosure of *Brady* material will not result in the granting of a new

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* The jury could not reach a verdict as to Chapman on the conspiracy count, the only count in which he was charged. That Chapman, who was instrumental in introducing Lucas to Perna, was not found guilty establishes that the jury's verdict was not based on seeing the actual cash as opposed to photographs of it. *Cf. United States* v. *Papadakis*, *supra*, 510 F.2d at 300-01.

trial unless there is a "significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction." *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975).

The district court found here that the Government's non-disclosure of three statements by Mario Perna made in October 1974 was the result of inadvertence. Applying the appropriate "skilled counsel" test, the court concluded that had these statements been available, a conviction could not have been avoided. That determination may not be disturbed unless unsupported by the evidence and clearly erroneous. *United States* v. *Parness*, Dkt. No. 75-1369 (2d Cir., Jan. 12, 1976), slip op. 1463, 1465; *United States* v. *Miranda*, 526 F.2d 1319, 1324-29 (2d Cir. 1975); *United States* v. *Zane*, 507 F.2d 346, 347 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *DeSapio*, 456 F.2d 644, 647-48 (2d Cir. 1972); *United States* v. *Silverman*, 430 F.2d 106, 119 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

Given the record here, the trial court could hardly have found other than it did.

A. Introduction

By letter dated November 11, 1975, the Assistant United States Attorney in charge of the prosecution at trial, which ended on October 24, 1975, furnished the court and all counsel with three written statements of Mario Perna given to representatives of the Federal Bureau of Investigation on October 11, 13 and 22, 1974. The three statements dealt with the escape of Perna and others from the Federal Detention Center in New York on September 22, 1974. The statements made no men-

tion whatever of any of Perna's narcotics activities or the narcotics activities of his associates. In the last of these statements, dated October 22, 1974, Perna admitted that in an earlier statement he had withheld information regarding his method of escape to protect members of his family, friends, associates and a member of the clergy, who had in fact assisted him and others in their escape (Magnano, et al., Joint Appendix at A. 146-67).*

Based on this disclosure Magnano, Pallatta, Bolella and De Lutro moved for a new trial based on newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure.** (Jt. App. at A. 136-A. 46).

The Government opposed these motions by affidavit of the Assistant United States Attorney in charge of the prosecution. He stated that he had not become aware of the existence of the three statements until November 8, 1975, approximately two weeks after the verdict, and that the statements were in the possession of another Assistant prior to the commencement of the trial. (Jt. App. at A. 168-A. 77).***

By order, findings and opinion dated January 6, 1976, the trial court denied the motions without a hearing. The court found that:

> "the contents of these statements became known to the Assistant United States Attorney in charge of the prosecution approximately two weeks after

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* Hereinafter "Jt. App."

** Lucas did not join in these motions.

*** By letter dated April 19, 1976, the prosecutor in this case advised defense counsel that the three statements had been introduced into evidence by the other Assistant in a Grand Jury investigation of the West Street jail break on October 29, 1974. Defense counsel were supplied with minutes of the Grand Jury proceeding.

the verdict when he thereupon informed the Court and all counsel of their existence, and that there was no deliberate suppression of these materials on the part of the Government, see *Giglio* v. *United States*, 405 U.S. 150, 153-54 (1972); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir. 1973), and that the statements would not have produced a different verdict if they had been available at trial, and that there is not a significant chance that the statements could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction, *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975); *United States* v. *Kahn*, *supra*; *United States* v. *Stofsky*, Docket No. 74-1860 (2d Cir. Nov. 7, 1975) slip op. 515, 525, and that the statements, if of any value at all, were only cumulative on the issue of credibility and that they had no bearing on the issue of whether or not the defendants were guilty. *United States* v. *Zane*, 507 F.2d 346, 348 (2d Cir.), *cert. denied*, 421 U.S. 910 (1975), and that Government witness Mario Perna's testimony was corroborated at trial by the testimony of other witnesses documents and a tape recorded conversation, *United States* v. *Sperling*, 516 F.2d 1323, 1332-34 (2d Cir. 1974)." (Jt. App. at 178-80).

Appellants Magnano, Pallatta, Bolella, Lucas and De Lutro argue that the court committed error both precedurally and substantively in denying their motions. Specifically, Bolella, Magnano and Pallatta and Lucas claim that the trial court should have conducted a hearing to determine the extent of prosecutorial culpability in the failure to provide this information prior to trial. They argue that the affidavit submitted by the Assistant in charge of the prosecution that he did not become aware of Perna's statements until two weeks after the verdict

was an insufficient basis upon which to find that the Government did not act wilfully in its failure to disclose and that, consequently, the trial court's application of the less stringent "skilled counsel" test was error. De Lutro and Lucas also claim that the trial court's findings that the statements could not have altered the verdict were without foundation. These fanciful claims simply ignore the record.

B. The trial court was not in error in determining without a hearing that any suppression was inadvertent

The trial court's finding that the Government did not wilfully fail to disclose the materials in question was not made in a vacuum as appellants suggest, but in light of comprehensive disclosures made by the Government prior to, during and after the trial. The trial court was aware that the Government had assiduously attempted to comply with its disclosure obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1968) and the Jencks Act, 18 U.S.C. § 3500 by revealing or providing the following information, tapes and/or documents to defense counsel:

> "(1) In or about January 1974 co-conspirator Mario Perna requested two persons to murder co-conspirator Anthony Verzino and supplied said persons with a shotgun and pistol for that purpose.
>
> (2) In or about the year 1972 Perna was party to an agreement with at least four other persons to have Anthony Verzino, Susan Verzino and William Sorenson murdered in 1972.
>
> (3) In or about the Summer of 1974, Anthony Verzino planned an escape from prison.
>
> (4) In or about the years 1970, 1971, 1972 and 1973 Anthony Verzino and Mario Perna partici-

pated in a conspiracy, apart from the one charged here, to import heroin from France into the United States and to distribute it.

(5) In or about September 1974 Mario Perna escaped with others from the West Street House of Detention.

(6) In the year 1972-73 Perna participated in a conspiracy, apart from the one charged here, to import cocaine into the United States and to distribute it. Perna pled guilty to said offense in United States District Court in the Southern District of Florida in or about February 1974 and was sentenced to a term of imprisonment of three years.

(7) In or about late 1974 and early 1975, Anthony Verzino misrepresented certain facts to the Government concerning his participation and the participation of others in the conspiracy mentioned in paragraph 4.

(8) Subsequent to the time that Mario Perna and Anthony Verzino began to cooperate with the Government they have received money from representatives of the Government for the purposes of support and protection of their lives and the lives of their families." *

(9) That a person known as Venzuela, who was in federal custody, had reported to representatives of the United States Attorneys' Office that Perna spoke to him regarding an escape attempt by

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* Letter by Assistant United States Attorney Dominic F. Amorosa dated September 5, 1975 to the court, copy to all counsel with the accidental exception of Edward Panzer, Esq., trial attorney for Magnano, who was made aware of this letter during the trial (Jt. App. A. 208-09).

Perna from an institution in which he was confined prior to trial (Tr. 947-48).

(10) That Anthony Verzino had admitted to perjury while a witness before the Hon. Edward Weinfeld in a federal district court criminal trial in 1965 (Tr. 695-96).

(11) That Anthony Verzino was examined by a psychiatrist at Bellevue Hospital on December 18, 1962 and was found to have been an "[u]nstable personality with aggressive behavior under the influence of alcohol" (Tr. 2623-30, 2126-31, 2236-37).

(12) That Anthony Verzino was examined by a psychiatrist at Bellevue Hospital on August 16, 1950 and was diagnosed as a "psychopathic Personality" (Tr. 2623-30, 3126-31, 2236-37).

(13) That Anthony Verzino had told a representative of the Office of the Special Narcotics Prosecutor of the City of New York during a taped recorded conversation, which was made available to all defendants prior to trial for copying, that he had gotten the heroin found in his stash at the time of his arrest—the precise issue in this trial—from sources other than the defendants on trial (Tr. 2215-18; GX 3502(a)(2)).

(14) That letters containing the following were written by Perna after his decision to cooperate with the Government:

(a) Letter to Anthony Verzino dated June 8, 1975 in which Perna suggested to Verzino that they be placed in the same custodial institution (GX 3501(d));

(b) Letter to Assistant United States Attorney Giuliani, dated June 10, 1975 in which

Perna threatened to "expose the whole rotten system" because of the "lies of inducement" and made efforts to get his New Jersey case transferred under Rule 20 to the Southern District of New York (Tr. 981-90, 992-93; GX 3501(e));

(c) Letter to Assistant United States Attorney Jaffe, dated September 10, 1975, in which Perna wrote that Jaffe "continually lied" to him (GX 3501(g)).

(15) Numerous tape recordings containing narcotics related conversations between Verzino and an informant known as James Culhane and between Perna and an informant known as Joseph Condello made prior to the arrests of Verzino and Perna. These tape recordings were made available for copying prior to trial. They were in the custody of the Office of the Special Narcotics Prosecutor for the City of New York (relating to Verzino) and the Office of the Drug Enforcement Administration in Newark, New Jersey (relating to Perna).

(16) Testimony of Verzino given before a state grand jury relating to his narcotics activities with one of his narcotics customers (GX 3502(a)(5)).

(17) A proposed application by Verzino, pursuant to Title 26, United States Code, Section 7623, to obtain from the Internal Revenue Service a financial award for information furnished to the Government with respect to the seizure of $584,000 in cash from Lucas in January 1975 (GX 3502(a)(1)).

(18) Testimony by Special Agent Bradley before a federal grand jury in the District of New Jersey

on February 15, 1974 relating to his investigation of Perna (GX 3505(n)).

(19) That it had been reported to the Government by an informant named James Culhane that Verzino told him that Verzino had killed another informant in connection with a prior case against Ernest Malizia (Tr. 2475-76; GX 3502(oo)).

(20) Approximately fifty-two items of 3500 material relating to Verzino, other than those already referred to (GX 3502(a)-3502(zz)).

(21) Six items of 3500 material relating to Perna, other than those previously referred to, including his grand jury testimony in this case, notes of an extensive debriefing of Perna relating directly to his trial testimony and another pre-trial letter to Assistant United States Attorney Jaffe (GX 3501, a, b, c, f, h, i).

These voluminous disclosures of which the trial judge was uniquely aware clearly demonstrated the Government had made every effort to produce information useful to the defense for the purpose of impeaching Government witnesses. Moreover, the fact that the Assistant responsible for the prosecution had disclosed the statements as soon as he learned of their existence confirmed for the trial judge that no deliberate suppression had occurred.

Furthermore, the district court's finding that Perna's three statements, "if of any value at all [to the defendants] were only cumulative on the issue of credibility and . . . had no bearing on the issue of whether or not the defendants were guilty" * necessarily found that the

* Perna testified on cross-examination that he was prepared to lie against people in whom he had no interest in order to help himself. (Tr. 1121-22).

statements in question were not of such a value to the defendants that they could not have escaped the prosecutor's attention. See *United States* v. *Catalano*, 491 F.2d 268, 276 (2d Cir. 1974), *cert. denied*, 419 U.S. 825 (1975); *United States* v. *Mayersohn*, 452 F.2d 521, 523-28 (2d Cir. 1971); *United States* v. *Bonanno*, 430 F.2d 1060, 1063 (2d Cir. 1970), *cert. denied*, 400 U.S. 964 (1971); *United States* v. *Keogh*, 391 F.2d 138, 148 (2d Cir. 1968).

Based on (1) the trial judge's intimate acquaintance with the Government's complete and comprehensive disclosure of far more significant *Brady* matters than the statements, (2) the fact that the Assistant United States Attorney in charge of the prosecution promptly alerted the court to the discovery of the statements, (3) the uncontradicted sworn statement of the prosecutor that he did not become aware of the statements until two weeks after the verdict, and (4) the insignificant value of the statements to the defense, the trial court properly determined, without a hearing, that the Government had not wilfully suppressed the statements. Cf. *United States* v. *Parness*, *supra*, at 1465; *United States* v. *Schwartzbaum*, 527 F.2d 249, 255-56 (2d Cir. 1975); *United States* v. *Slutsky*, 514 F.2d 1222, 1226 (2d Cir. 1975); *United States* v. *Zane*, *supra*, 507 F.2d at 347.*

Appellants reliance upon the statement in *United States* v. *Hilton*, 521 F.2d 164, 167 (2d Cir. 1975) that:

> "the facts surrounding the non-disclosure be developed in an adversarial context"

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* It is well settled that on motions for a new trial the court may resolve disputed questions of fact and issues of credibility without an evidentiary hearing, on the basis of the affidavits submitted by the parties. *United States* v. *Johnson*, 327 U.S. 106 (1946); *United States* v. *Persico*, 339 F. Supp. 1077, 1083 (E.D.N.Y.), *aff'd*, 467 F.2d 485 (2d Cir. 1972), *cert. denied*, 410 U.S. 946 (1973).

is mispiaced. Hilton was an incarcerated defendant without knowledge of the law, who was compelled to conduct his own cross-examination of government witnesses at a previously ordered hearing. Hilton had, in effect, been denied his right to counsel. Moreover, in that case, the District Judge did not make a specific finding on the issue of whether the non-disclosure was inadvertent.

In a recent case involving allegations of governmental misconduct and perjured testimony, *United States* v. *Franzese*, 525 F.2d 27 (2d Cir. 1975), this Court affirmed the District Judge's finding, made without an evidentiary hearing, the Court significantly stating:

> "Although the question may have been close, we are unwilling to disturb the district court's decision not to conduct a hearing. Chief Judge Mishler had the advantage of intimate familiarity with the case, born of many pre- and post trial motions and a long trial where he had the opportunity to observe the witnesses . . . we hold that the judge was not required to conduct an evidentiary hearing." 525 F.2d at 32 (citations & footnotes omitted).

Judge Cooper had a similar familiarity with this case. In the absence of allegations of evidentiary facts in such detail as to have raised substantial issues, *Seiller* v. *United States*, Dkt. No. 75-2002 (2d Cir. Dec. 1, 1975) slip op. 6509, 6535, the court's finding, without a hearing, was proper.*

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* Bolella's argument that the failure to disclose resulted from the prosecutor's erroneous interpretation of *Brady* v. *Maryland* is specious. First, the Assistant was not aware of the existence of Perna's statements to the F.B.I. until after trial when he in-

[Footnote continued on following page]

formed the court and all counsel of them. Secondly, Bolella's argument in support of this contention is misleading.

He records in his brief the following statements by the Assistant United States Attorney:

> "We are not required as a matter of law when a Brady matter comes up to divulge everything with respect to it . . . We oppose any motion to obtain the report in which Mr. Verzino misrepresented certain facts, if one exists . . . I don't have the documents here to turn over to these men and we submit we don't have to turn them over." (Bolella's Brief at 46)

Bolella leaves the impression by artfully placed ellipses that the Assistant attempted to conceal that Verzino lied to the Government over a period of several months regarding another narcotics case apart from the one being tried. But the same Assistant had, by letter two weeks prior to trial, informed the court and counsel except trial counsel for Magnano that Verzino had done so. When Verzino was on the witness stand no attempt was made to cross examine him regarding this matter. After he left the witness stand, trial counsel for Pallatta, recalling the letter, stated to the court that the contents of the letter had not been developed while Verzino was on the stand due to an oversight. The Assistant then agreed to stipulate to the fact that Verzino had lied to the Government regarding another narcotics case. (Tr. 3424-25, 3429).

It was on this foundation, one in which the Government revealed prior to trial that Verzino had lied over a period of several months regarding another case, and agreed to stipulate to this fact that the prosecutor expressed the view that *Brady* did not require the actual production of the report which reflected Verzino's lies. What the Assistant actually said to the court, minus the ellipses found in Bolella's brief, was the following:

> "We are not required as a matter of law when a Brady matter comes up to divulge everything with respect to it. We said in letter form what happened in substance. All other counsel, of course, were on notice that they could have questioned Verzino with respect to these misrepresentations. If they desire to call Verzino back to the witness stand on this, it's up to Your Honor whether Your Honor wants Verzino called. We will stipulate with respect to the fact that Verzino misrepresented certain facts in late 1974 and early 1975 in connection with the Atlanta heroin conspiracy.

[Footnote continued on following page]

C. The court was correct in finding that the statements were only cumulative on the issue of credibility, if of any value at all, and that they had no bearing on the defendants' guilt.

The trial record demonstrated that Mario Perna was perhaps the most impeached witness in recent times. He admitted on the witness stand (1) that he had conspired on two occasions to kill Verzino and on one occasion to kill Verzino's wife and another person (Tr. 820-23); (2) that he had previously filed a perjurious affidavit on behalf of a narcotics associate in return for a promise of $50,000 (Tr. 1051-52, 1366-68); (3) that he had hoped to bribe witnesses against him to perjure themselves (Tr. 1392); (4) that he had been a member of a conspiracy while he was incarcerated in Atlanta Federal Penitentiary, apart from the one being tried, to import hundreds of kilos of heroin into the United States for which the Government had agreed not to

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Of course, our stipulation on our part would also include a statement as to why he misrepresented those facts.

We think that is enough. We don't think Verzino has to be called back to the witness stand at all, and we oppose any motion to call him back to the witness stand in connection with this, and we also oppose any motion to obtain the report in which Mr. Verzino misrepresented certain facts, if one exists.

I believe there is a report with respect to it. I'm not certain. But there is no question everyone was advised of this, with the exception of [counsel for Magrano]" (Tr. 3429-30).

Brady forbids prosecutorial "suppression of evidence, in the face of a defense production request." *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972). It has never been held that it is the equivalent of the Jencks Act requiring productions of documents having nothing to do with the witness' direct testimony at trial. It simply requires disclosure of the exculpatory information, which was accomplished here prior to trial. *Cf. United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974).

prosecute him in return for his cooperation (Tr. 971-73; GX 8); (5) that he had been a member of yet another conspiracy, apart from the one being tried, to import hundreds of kilos of cocaine in the United States (Tr. 960-62); (6) that part of his agreement provided that the Government would not prosecute his wife (Tr. 1041, 3641-42; GX 8); (7) that he had two prior federal narcotics convictions, one armed robbery conviction and one conviction for desertion from the Armed Forces during the Korean War (Tr. 1030-32, 1101-02); (8) that he escaped from federal custody on September 22, 1974, after he had begun to cooperate with the Government in February, 1974 (Tr. 1126-29); (9) that the only livelihood he knew was dealing in drugs (Tr. 1015); (10) that throughout his life he had lied to serve his own ends and that he was prepared, at the time he was on the witness stand, to lie against innocent people in whom he had no interest in order to help himself (Tr. 1052, 1121-22, 1171); (11) that he had no remorse for selling drugs (Tr. 1085); (12) that he wanted Joseph Condello to kill Verzino for him as a favor (Tr. 1107); (13) that as part of his agreement with the State of New York, he would be permitted to plead guilty to three New York State narcotics offenses for which the penalties ranged from 1 year to 8-1/3 years as a minimum to life imprisonment as a maximum, rather than New York State narcotics offenses for which the penalties ranged from 15 years to 25 years as a minimum to life imprisonment as a maximum and that the state prosecutor would recommend to the sentencing judge that Perna's sentence on the three charges run concurrently with each other and concurrently with any federal sentence he might receive (Tr. 1147-48, 1216-17; (GX 8); (14) that he had been told that if he did not cooperate he would spend the rest of his life in jail (Tr. 1298-99); (15) that before his last arrest he had lied to his parole officer (Tr. 971-72); (16) that

to facilitate his escape from West Street he had bribed a federal correctional officer (Tr. 1018).

Perna's testimony was also contradicted on several crucial matters by the testimony by Verzino, and by his own prior statements.*

In view of this extraordinary impeachment of Perna —fully capitalized on by defense counsel—it is hardly surprising that the trial court found that Perna's three statements to the Federal Bureau of Investigation, which established that he withheld information over an eleven-day period in October, 1974 to protect members of his family, friends, associates and a member of the clergy ** and which had nothing whatever to do with his narcotics trafficking activities, were cumulative on the issue of his credibility, if of any value at all. Indeed, further impeachment of Perna by proof that he withheld information from the F.B.I. to protect people close to him regarding his escape would have been superfluous as he had already admitted during his testimony that he was fully prepared to lie about people in whom he had no interest in order to serve his own purposes (Tr. 1121-22, 1171). See *United States* v. *Costello*, 255 F.2d 876

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* Verzino testified that Perna was with him when he met with Soldano; Perna testified that he was not (Tr. 830-32, 2022-29). Perna testified that when Verzino joined him and Malizia, Verzino was given the equivalent of a $400,000 share of the partnership. Verzino testified that this was not so (Tr. 950-54, 2221-36). Perna testified on cross-examination that he first agreed to become a witness in this case in mid-February 1974 (Tr. 1126-27). He subsequently testified that in mid-February he told agents of the Government he did not want to testify in any case (Tr. 2858-59).

** On cross-examination, Perna implicated his wife, his girlfriend and a Catholic priest in his escape. This testimony was consistent with his final statement to the F.B.I. (Tr. 1019, 1112-13, 1227-28).

(2d Cir.), *cert. denied*, 357 U.S. 937 (1958); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969); *United States* v. *Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975). That Perna briefly withheld information from the F.B.I. was perfectly consistent with his admitted tendency to lie when it was to his advantage.

Appellants contend that the undisclosed material would have established something which they were unable to show, *i.e.*, that Perna could not be trusted to cooperate in good faith with the Government by revealing the truth. But this ignores the fact that Perna's cooperation begun, by his own testimony, in February, 1974 and that he later escaped from custody in September, 1974 (Tr. 1126-29). Moreover, appellants' current preoccupation with the fact that Perna withheld information from the F.B.I. over an eleven day period did not manifest itself at trial. Perna was never asked whether he had ever lied to any representative of the Government during the full period of his cooperation. If appellants believed that such an admission would have assisted their cause, one would think that he would have been questioned regarding this especially since Perna had testified that he would lie to help himself.* The failure to do so is indicative that since Perna had admitted that he was prepared to lie to help himself, any further impeachment along these lines was unnecessary.**

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* Perna was asked whether he had lied to any representative of the Government since June, 1975 and responded that he had not. If this question had been expanded to include the entire period of his cooperation, the record would have disclosed what appellants now claim to be error (Tr. 1316).

** Lucas' failure to move for a new trial below or to even join in his co-defendants' motion demonstrates his own lack of faith in his current position. Indeed, one would think from his arguments here that he would have quickly moved on this issue below.

Lucas' argument that the statements prove that Perna perjured himself at trial, because they contradict his trial testimony that he and Malizia planned their escape in August, 1974 after they believed Verzino was cooperating, is frivolous (Lucas' Br. at 50-51; Tr. 916-19).* Although the statements do indicate that Perna made efforts to escape some months before August, they also make clear that his and his accomplices' successful effort to bribe a correctional officer at the institution to supply two key impressions for locked doors, which percipitated the escape and was the capstone of the plan, occurred in approximately early August (Jt. App. A.149, A.164).

Further, the question as to when Perna planned his escape was far afield from the issues at trial and no appellant now claims it was anything more. Even assuming Perna's testimony was a series of lies designed to frame the defendants to protect his true narcotics associates, which was the defense position at trial, he would still have had no reason or motive to lie about when he and Malizia planned their escape.

What the statements do show is that Perna withheld information from and lied to the F.B.I. over an eleven day period. But Perna never testified on either direct or cross-examination that he told the truth to all representatives of the Government during the entire period of his cooperation. Further, Perna's testimony that subsequent to his recapture he agreed to cooperate with the

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* The only reference in all of Perna's direct testimony—encompassing some 500 pages of the record—to his escape was that he and Malizia planned it in approximately August, 1974 (Tr. 916-19). On cross-examination Perna was questioned extensively about the details of the escape (Tr. 1017-19, 1085-87, 1111-13, 1227-28). There is no claim here that any of this testimony is inconsistent with his statements to the F.B.I.

Government was consistent with the facts, for he did *agree* that he would do just that.

Indeed, if the statements had been shown to the jury they would have been far more helpful to the Government than the defense. In the final statement, dated October 22, 1974, Perna incriminated his wife, his brother, his girlfriend and Malizia's twenty-one year old son in his plans to escape.* From this the Government could have convincingly argued that as of October 22, 1974 Perna had obviously decided to tell the truth to the Government no matter who it implicated criminally.**

Coupled with the trial court's finding that the availability of the statements would have been cumulative on the question of Perna's credibility, if of any assistance at all, was the conclusion that Perna's testimony had been corroborated by other witnesses, documentary evidence and a tape recording. See *United States* v. *Sperl-*

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* Significantly, Perna was extensively debriefed by agents of the Drug Enforcement Administration for the first time on October 26, 1974, four days after his final statement to the FBI. The notes of the debriefing, which were furnished to all counsel as *3500* material, were essentially consistent with Perna's trial testimony (GX 3501(c)).

** Appellants argue that because of the Government's failure to disclose this information, it was free to argue that after Perna's recapture he realized that the only way he could help himself would be to cooperate fully and that he had done so (Bolella's Br. at 47-48). While the Government did make this argument, the argument would have been much stronger that Perna was telling the truth at trial had the jury been aware that Perna had gone so far as to incriminate those closest to him with respect to the escape after initially attempting for a short while to conceal their involvement. If Perna was willing to tell the truth about his loved ones, he would have been viewed as that much more likely to tell the truth about his narcotics associates.

ing, supra, 506 F.2d at 1332-34. Based on the record, no other determination was possible.*

While Perna provided a great deal of testimony incriminating Pallatta and Magnano, by relating many meetings and narcotics related conversations, Verzino also testified that he had several narcotics-related meetings with these defendants, thereby corroborating Perna.**

Perna's testimony against Bolella was limited to one meeting during which Bolella discussed with Verzino the possibility of Bolella and his partners giving Verzino and his partners a price reduction for heroin (Tr. 671-73). Verzino not only testified to this meeting with

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* With respect to certain defendants Perna's testimony was insignificant in any event. The testimony of Verzino, not Perna, was the controlling factor in the convictions of De Lutro and Soldano. Verzino testified that he first negotiated with Soldano and later bought 3 kilos of heroin from him. Indeed, Perna's testimony indicated he never met Soldano and whatever he knew about Soldano was limited to what Verzino told him about the transaction.

As to De Lutro and the 5 kilo purchase in November, 1973, Verzino testified that he arranged the transaction personally with De Lutro and was alone with De Lutro when the sale was made. Perna's testimony, aside from relating what he was told by Verzino, was limited to a post-sale meeting with De Lutro at which he, Verzino, Ernest Malizia and De Lutro discussed the shortage of the heroin received. Consequently it was Verzino's testimony, with only slight assistance from Perna, which convicted De Lutro. De Lutro has conceded that this appraisal is accurate, labeling Perna's testimony as only marginally confirming Verzino's (De Lutro's Br. at 18).

** For example, Verzino testified that shortly after he was released from prison in September 1973 he met Pallatta who told him that he and his partners had been selling heroin to Perna and Malizia for awhile (Tr. 1851-58). Verzino was seen with Frank Ferraro, a/k/a "Skooch" by Special Agent Hall on February 7, 1974 while he was surveiling Verzino (Tr. 2899-2903). Skooch was one of the Pallatta organization's delivery men.

Bolella but also two others during which they discussed their narcotics activities.*

Perna's testimony against Pallatta was also corroborated by a piece of paper found in his possession at the time of his arrest with a notation reading "owe F.B 333." ** Perna testified that this notation, which he had made, reflected that he and his partners owed Pallatta, whom he knew as Frank Bolot, and his partners $333,000 at the time of his arrest for heroin previously purchased (Tr. 850-53; GX 1). Special Agent Scrocca testified that he grew up in the same neighborhood in the Bronx as Pallatta, Verzino, Magnano and Bolella and that Pallatta was also known as "Bolot" and "Nose", in addition to other names (Tr. 2718-19).***

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* At the time of his arrest Verzino had Bolella's phone number in his possession next to the name "Blond" which Verzino testified was the code word he and Bolella agreed to (GX 45; Tr. 1915-23). During Verzino's last meeting with Bolella, which occurred shortly before Perna's arrest in late January, 1974, Bolella warned him that law enforcement officers were surveilling Perna. Bolella had acquired this information through a corrupt agent or policeman (Tr. 1924-27).

** This document was of crucial significance as it also contained references to Lucas, Gwynn and others who owed Perna money (GX 1).

*** Pallatta did not present evidence that he was not known as "Bolot." His trial attorney argued in summation that Perna and Verzino were lying as to Pallatta being known as "Bolot" and Scrocca, who confirmed this, provided interested and polluted testimony (Tr. 3806-08). Found in Verzino's stash immediately after his arrest was a piece of paper on which the following notation appeared: "Nasone—almost 9 (8¾)" Verzino testified that "Nasone" referred to Pallatta as it is Italian for "Nose" and that the entry reflected that Verzino had on hand in the stash approximately 8¾ or 9 kilograms of diluted heroin which Verzino and his partners had previously purchased from Pallatta's group. On the same piece of paper the notation "McCoy-approx 3" appeared. Verzino testified that

[Footnote continued on following page]

Perna, during a conversation with Joseph Condello on January 7, 1974, told Condello, who was one of his former heroin customers who was then cooperating with the Government, in a conversation which was recorded by Condello and introduced into evidence:

> " . . . meantime, the other guys we owe them money for the goods, [Verzino's] been avoiding them and he knows the guys personally, he knows 'em for years" (GX 78, 79).

Perna testified that when he said this to Condello he was referring to Pallatta, Magnano, Bolella and their partners who remain fugitives (Tr. 818-20).

Pallatta, Magnano and Bolella did not dispute at trial Verzino's testimony that they knew Verzino for almost all of their lives. In fact, trial counsel for Pallatta suggested to Perna on cross-examination that he and Verzino had planned to frame Pallatta and Magnano, whom Verzino knew from his boyhood days (Tr. 1013).*

Based on the testimony of Verzino, Scrocca, multiple documents taken from Verzino, Perna and Malizia ** at

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this notation represented that he had approximately 3 kilos of pure heroin in the stash at that time, which he had gotten from De Lutro and Soldano (Tr. 2054-55, 2096-2100; GX 35). Independent evidence established that the stash contained approximately 10 kilos of diluted heroin and three of pure heroin (Tr. 2675-86; GX 87, 87A).

* Verzino's testimony was further corroborated by other documents seized from him at the time of his arrest (Tr. 2056-62; GX 36).

** Perna, Verzino and Malizia each had Lucas' and Gwynn's phone number on them at the time of their arrests. Malizia's phone numbers were in code (Tr. 860-64, 2067-88, 2865-68, 2876, 1425-28, 1494-1501, 1617-18, 2875, 3581-82; GX 8, 9, 45). The evidence as to Lucas' guilt was overwhelming.

the time of their arrests, the court properly found that Perna's testimony was corroborated.*

POINT V

Lucas was not denied his Sixth Amendment right to the assistance of counsel.

Lucas argues that the Court denied him the right to be represented by counsel on September 22, 1975, the day the case was called for trial, and that therefore his conviction must fall. His argument is meritless.

Several months before September 22, 1975, the court notified all counsel that the trial would begin on that day at 1 P.M. On September 16, 1975 Mr. Jeffrey Hoffman, Lucas' attorney, wrote to Judge Cooper informing him that he was currently on trial in another case in the Eastern District of New York and sought "appropriate arrangements" concerning Lucas' trial (Tr. 16). On that same day the Assistant United States Attorney in charge of the prosecution wrote to Judge Cooper stating that Mr. Hoffman's request was, in substance, an application for a severance.** The letter suggested that another member of Mr. Hoffman's firm be ordered either to substitute for him in Lucas' trial or to take Mr. Hoffman's place in the Eastern District trial.*** Also on the same

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* Magnano's and De Lutro's current protestations of innocence are inconsistent with their attempts to negotiate guilty pleas with the Government prior to trial, referred to by their respective trial counsel subsequent to the verdict (Tr. 4282, 4295).

** Mr. Hoffman did not favor the United States Attorney's Office with notice of his scheduling problem. The Assistant United States Attorney learned of this only when Judge Cooper's law clerk mentioned it to him (Tr. 23-24).

*** Hoffman was then a member of the firm of Lenefsky, Gallina, Mass & Hoffman.

day, Judge Cooper's secretary, pursuant to Judge Cooper's directions, wrote to Mr. Hoffman that Judge Cooper could not delay the trial and that Judge Cooper had directed that Mr. Hoffman's firm appear to represent Lucas on September 22, 1975. (Tr. 13-17).

Several minutes before 1 P.M. on September 22nd, Judge Cooper received an affidavit submitted by Mr. Hoffman indicating that he was on trial in the Eastern District and that he was unable to appear (Tr. 21-22). Notwithstanding Judge Cooper's direction that another member of Hoffman's firm appear for Lucas to select a jury, no one from this firm did so on September 22nd, and the Government moved for a bench warrant of arrest for a Mr. Mass, a member of Mr. Hoffman's firm who had played a role in the pretrial proceedings of the case and was available, but who had not appeared notwithstanding Judge Cooper's instructions to Hoffman of September 16, 1975 (Tr. 23-24).*

During Mr. Hoffman's absence Judge Cooper made some introductory remarks to the panel of prospective jurors, who were then sworn and, because of Hoffman's absence, excused until September 24th—the date it was anticipated Hoffman would be available.** Following the departure of the prospective panel of jurors, several oral motions were spontaneously addressed to the court by counsel for some of the other defendants. These were as follows: (1) a renewed motion by counsel for Magnano

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* The trial court later labeled the failure of anyone from Mr. Hoffman's firm to appear a "disgraceful performance". See Tr. 902-04.

** Judge Cooper spoke to Hoffman on September 22nd by telephone and learned the then status of the Eastern District trial. (Tr. 24-30). When trial actually began on September 24, 1975 with the selection of a jury, Hoffman was present to represent Lucas.

for additional peremptory challenges on behalf of all the defendants, which was granted, increasing the number of such challenges for the defense from 10 to 15 (Tr. 36-40); (2) a motion made on behalf of defendants Pallatta and Bolella to exclude the testimony of Anthony Manfridonia which was reserved by the court until trial and at that time granted (Tr. 40-45); (3) a renewed motion made by counsel for Pallatta for a competency hearing on Government witness Verzino on which the court reserved decision (Tr. 45-49); (4) a renewed motion by counsel for De Lutro to suppress an intercepted wire communication involving De Lutro on which decision was reserved (Tr. 49-51); (5) a motion by counsel for De Lutro to produce and have ready his own defense witnesses, which was granted (Tr. 51-52); (6) a motion by counsel for Chapman to preclude the Government from using his prior narcotics conviction to impeach him, which was denied (Tr. 53); (7) a motion by counsel for Bolella for an audibility hearing, which was granted (Tr. 57); and (8) a renewed motion by counsel for Soldano for a suppression hearing relating solely to Soldano on which decision was reserved (Tr. 58-60).

After these oral motions a New Jersey attorney named Larry Bronson, who represented Lucas in connection with a matter relating to Lucas' medical treatment, announced to the court, with the consent of Lucas, that Lucas was in need of medical treatment. The court then ordered that Lucas be medically examined (Tr. 64-66).

On September 24, 1975 Hoffman appeared for Lucas and prior to the selection of the jury addressed to the court two applications on Lucas' behalf (Tr. 73-78). Thereafter Hoffman was present and represented Lucas for the duration of the trial.

At no time in the proceedings below, including September 22 and 24, 1975, did either Lucas or Hoffman object or move for a mistrial on the ground that by reason of what had occurred on September 22nd, Lucas had been denied his Sixth Amendment right to the assistance of counsel. In light of that fact alone, Lucas' claimed infringement of his right to counsel warrants no relief. His failure to raise this claim before trial or at the trial itself precludes its effective assertion for the first time on appeal. *Stith* v. *United States*, 361 F.2d 535, 536 (D.C. Cir. 1966).

Moreover, on the merits the claim must fail. "[T]here was no possibility of prejudice" to Lucas by reason of his attorney's absence from the pre-trial occurrences of September 22, 1975. *United States* v. *Calabro*, 467 F.2d 973, 989 (2d Cir.), *cert. denied*, 410 U.S. 926 (1972). *See United States* v. *Moher*, 455 F.2d 584, 585 (2d Cir. 1971); *United States* v. *Leighton*, 386 F.2d 822, 823 (2d Cir. 1967), *cert. denied*, 390 U.S. 1025 (1968); *Martin* v. *United States*, 182 F.2d 225 (5th Cir.), *cert. denied*, 340 U.S. 892 (1950); *United States* v. *Murphy*, 413 F.2d 1129, 1140-41 (6th Cir.), *cert. denied*, 396 U.S. 896 (1969); *Stith* v. *United States*, *supra*, 361 F.2d at 536; *McGill* v. *United States*, 348 F.2d 791, 793 (D.C. Cir. 1965).*

The swearing of a panel of prospective jurors is exclusively a clerical function. As the record demon-

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* The Government does not argue that the presence of Lucas' New Jersey attorney, who represented him with respect to his alleged medical problem, during the proceedings on September 22nd constituted assistance of counsel for purposes of the criminal case against him. This is so because it was clear at the time that the New Jersey attorney was not in any manner involved in the proceedings, except to the extent that he stated to the court that Lucas had a physical ailment involving his left wrist.

strates, it was accomplished here, like Judge Cooper's introductory remarks, in a fair and impartial manner and Lucas does not contend otherwise. Moreover, although there were eight motions submitted by other counsel in the absence of Lucas' attorney, only two had any conceivable relation to Lucas.* The first was the motion made by counsel for Magnano for additional peremptory challenges on behalf of all of the defendants. This motion was in fact granted by the court on behalf of all the defendants increasing the number of peremptory challenges from 10 to 15 (Tr. 36-40). The only other motion conceivably relating to Lucas was the renewal of a motion previously made by counsel for Pallatta for a competency hearing concerning Government witness Verzino. The court reserved decision on this motion until trial (Tr. 45-49).

Lucas does not contend here, nor did he below, that prior to the commencement of jury selection on September 24th, his attorney was somehow denied an opportunity to make any additional argument he desired with respect to the number of peremptory challenges to which Lucas or the defendants generally were entitled, or any other matter which was before the court two days earlier during counsel's absence. Hoffman simply chose not to do so (Tr. 71-78).

Finally, Lucas' argument that the mere self-imposed absence of counsel in this pretrial context entitles him to relief is at odds with the law in this circuit. *In Re Di Bella*, 518 F.2d 955, 959 (2d Cir. 1975); *United States* v. *Calabro*, *supra*, 467 F.2d at 988-89; *United States* v.

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* Six of the motions related exclusively to the moving defendants and, as such, it is highly doubtful that Lucas' counsel would have had the right or been given the opportunity to address the issues those motions raised.

Leighton, supra; cf. United States v. *Schor*, 418 F.2d 26, 29-30 (2d Cir. 1969).*

Nothing in the Supreme Court's recent decision in *Geders* v. *United States*, — U.S. —, 44 U.S.L.W. 4420 (March 30, 1976), points in a different direction. The Supreme Court there, in reversing a federal criminal conviction, held only that a trial court's "order preventing [a defendant] from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment" (*id.* at 4421), even in the absence of a claim of prejudice. In *Geders*, of course, defendant's counsel had vigorously objected to the court's order.

Here, in contrast, there was no objection below to any purported deprivation of counsel's assistance—a now felt deprivation which was the product, if anything, of counsel's conflicting commitments, rather than any court order. Moreover, any alleged deprivation here did not occur during trial with Lucas on the stand, as was the case with the defendant in *Geders*. Finally, in *Geders* the high court was at pains to emphasize that the vitality of this Court decision in *United States* v. *Leighton*, 386 F.2d 822 (2d Cir. 1967), was not before it. (44 of this Court's decision in *United States* v. *Leighton, supra*, was not before it (44 U.S.L.W. 4422-22, n.2). In *Leighton*, of course, this Court held that a trial court's ruling, over defendant's objection, that the latter could not consult with his attorney during a brief luncheon recess between defendant's direct and cross-examination

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* "Despite the broad language of such cases as *Hamilton* v. *Alabama*, 368 U.S. 52 . . . (1961), the absence of counsel at a 'critical stage' of proceeding does not always require a finding of prejudice per se." *In re Di Bella, supra*, 518 F.2d at 959.

did not warrant reversal, in the absence of some showing by defendant that the ruling was prejudicial.

Lucas' belated claim in these circumstances warrants no relief.

POINT VI

The court room identification of Soldano and the trial court's charge on this issue were proper.

Prior to trial Soldano moved, pursuant to Rule 41 of the Federal Rules of Criminal Procedure, for a hearing to determine the admissibility of testimony concerning his identity and for a further order suppressing any in-court identification which the court found to be the result of an impermissively suggestive pre-trial identification. In support of his motion, Soldano filed only the affidavit * of his attorney which claimed that the relief sought was vital to a proper defense. (Soldano's App. at 25, 31-32). By order dated September 2, 1975, the trial court denied Soldano's request for a hearing on the identification issue relying on *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969), which held that the trial court is not required to conduct a hearing on a motion to suppress pursuant to Rule 41 when the defendant's moving papers did not state sufficient facts which, if proven, would have required the granting of relief.** (Soldano's Addendum).

During the trial Soldano again moved to suppress any identification of him and called for a hearing in

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* Counsel's supporting affidavit was erroneously entitled "Affidavit in Support of Motion to Dismiss." (Soldano App. at 25).

** The court also cited *Simmons* v. *United States*, 390 U.S. 377, 384 (1968).

support of his motion.* The motion was made on the basis of his attorney's oral representation that prior to trial the Government advised him that Soldano's identity was established by means of a photographic display to Government witness Verzino, and that he had no way of knowing whether the pre-trial identification was suggestive and whether Verzino's in-court identification of Soldano was the result of an impermissible display of photographs (Tr. 2110-13). There was again no statement, sworn or otherwise, from Soldano himself that Verzino was a stranger to him or, at least, was not well-known to him.** The trial court again denied Soldano's motion for a hearing finding that it saw no basis for it, but permitted counsel to explore the subject on cross-examination (Tr. 2115-17). See *United States* v. *White*, 446 F.2d 1283 (3d Cir.), *cert. denied*, 404 U.S. 945 (1971).

Soldano claims it was error for the trial court not to have held a hearing to determine whether Verzino's pre-trial identification of him was the product of an impermissively suggestive photographic display and, if so, whether his in-court identification of Soldano was tainted by the display. This argument lacks merit.

Although it is desirable to conduct pre-trial hearings to determine the validity of pre-trial identification procedures, see *Saltys* v. *Adams*, 465 F.2d 1023, 1028, n.8 (2d Cir. 1972), when a motion for a hearing pursuant to Rule 41 is made, unless it is supported by sufficiently

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* Soldano's oral motion was made after Verzino identified him at trial and after Verzino testified that he had four meetings with Soldano, although Soldano had attempted to renew his motion long before this (Tr. 58-60, 2017-42). It was the Government's position that based on Verzino's testimony no identification issue existed and that the only issue was whether Verzino was telling the truth (Tr. 2113-14).

** Overt Act number 21 of the conspiracy count alleged that Soldano delivered 3 kilos of heroin to Verzino in Queens in or about January, 1974.

definite allegations which, if true, would require the granting of relief, it should be denied. *United States* v. *Hickok*, 481 F.2d 377, 378-79 (9th Cir. 1973); *United States* v. *White*, *supra*, 446 F.2d at 1284-85; *United States* v. *Allison*, 414 F.2d 407, 410 (9th Cir.), *cert. denied*, 396 U.S. 968 (1969); *United States* v. *Culotta*, *supra*, 413 F 2d at 1345; *United States* v. *Gillette*, 383 F.2d 843, 848 (2d Cir. 1967); *Cohen* v. *United States*, 378 F.2d 751, 760 (9th Cir. 1967); *Grant* v. *United States*, 282 F.2d 165, 170 (2d Cir. 1960); *Cheng* v. *United States*, 125 F.2d 915, 916 (2d Cir. 1942). Here, Soldano offered nothing in support of his motion for a hearing except his attorney's conclusory statements that it was necessary to conduct a proper defense. Even after his attorney was shown the display from which Verzino selected Soldano's picture, which contained thirty-two photographs of white males, he made no claim that the display was in any way suggestive, and does not make that claim here (Soldano Ex. C and GX86).* Nor did Soldano at any time specifically controvert Verzino's testimony that he had face to face meetings with him on a number of occasions under conditions that left no doubt about Verzino's ability to identify him. Consequently, the denial for his motion for a hearing was proper. See *United States* v. *White*, *supra*; *United States* v. *Allison*, *supra*.**

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* At no time either prior to trial or during trial did Soldano's attorney request the court to examine the display to determine whether it was suggestive. The display is in the possession of the Government and is available for review.

** It was stipulated that most of the thirty-two photographs contained in the display, including Soldano's, were taken on March 13, 1975 following a police raid on a suspected dice game at 131 Mott Street in New York City and that the gambling charges were later dismissed (Tr. 3643-44). Soldano's argument that a pre-trial hearing could have determined whether Soldano's state arrest for gambling, which resulted in his picture being taken and later placed in the display, was supported by probable cause was never raised below. (Soldano Br. at 17).

In any event, Verzino testified on cross-examination that in about March, 1975 he was given a large group of photographs and asked whether he had had any narcotics dealings with any of the individuals depicted. He was not told the circumstances under which the photographs were taken.* From these photographs he selected the picture of Soldano, whom Verzino knew only as "Tony," as the person who sold him three kilos of heroin in late January, 1974 (Tr. 2408-09, 2415-16).** From this proof it was clear that Verzino's pre-trial identification of Soldano was not impermissively suggestive. *Cf. United States* v. *Roby*, 499 F.2d 151, 153-5 (10th Cir. 1974).***

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* Soldano again moved for a suppression hearing at the close of the Government's case. He offered nothing more in support of this motion, and it was again denied (Tr. 3505-3505A).

** Soldano's suggestion that Verzino testified that he selected other "suspects" from the spread is in error. (Soldano Br. at 12). Verzino testified that he recognized several other photographs in the spread. He did not say that he had narcotics transactions with any of these individuals (Tr. 2422-23). His testimony that Soldano was his source was unshaken (Tr. 2416).

*** Soldano's statement in his brief that Verzino was told by a Government agent in the fall of 1974 that "Tony" was a man by the name of "Visconti" is also error. (Br. at 11). During the fall of 1974, after Verzino began to cooperate, he made attempts to determine the true last name of "Tony". During that period another Government informant, Nicholas Christopher, suggested to Verzino or agents of the Government that "Tony's" name might be "Visconti." When the superseded indictment was returned in January, 1975, the name Anthony Visconti appeared as being the "Tony" from whom Verzino bought heroin. The Government admitted prior to the trial that the fact that the name Anthony Visconti appeared in the indictment was a mistake as there was no evidence before the grand jury that "Tony's" last name was Visconti or any other name. Subsequent to the Indictment in March 1975, Verzino for the first

[Footnote continued on following page]

Moreover, even assuming that the pre-trial identification of Soldano was impermissively suggestive, a claim which Soldano does not make here, Verzino's testimony plainly established that there was an independent basis for his identification of Soldano. *Neil* v. *Biggers*, 409 U.S. 188 (1972); *United States* v. *Burse*, Dkt. No. 75-1388 (2d Cir. Mar. 8, 1976), slip op. 2507, 2514-15; *United States* v. *Tramunti*, *supra*, 513 F.2d at 1116; *United States ex rel. John* v. *Casscles* 489 F.2d 20, 23 (2d Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States* v. *Evans*, 484 F.2d 1178, 1185 (2d Cir. 1973); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970).

Verzino met Soldano on four separate occasions in late January, 1974. During two of these occasions Verzino

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time identified the person who he claimed sold him the three kilos of heroin. That was Soldano. A superseding indictment was thereafter filed naming Anthony Soldano a/k/a "Tony" in place of "Anthony Visconti." The Government had no evidence at trial nor does it now that a person by the name of Anthony Visconti exists or ever existed, and Verzino never identified anyone but Soldano as the person who sold him the heroin. The jury was made aware of the error through stipulation (Tr. 3643-44).

Soldano makes no claims here that he was prevented from subpoenaing and interviewing Christopher or any agent of the Government who was involved in any of the events which led up to the name "Anthony Visconti" appearing in the first indictment. Prior to Verzino's cross-examination the Government revealed to Soldano's attorney the foregoing facts and they were developed during Verzino's testimony on cross and re-direct examination (Tr. 2416-19, 2576-78, 2618-19, 3643-44) (Soldano App. 35-37).

Soldano's further statement in his brief that Verzino testified that he was asked whether "Tony's" name could be "Christopher" is the obvious result of an error in the record which the next page of the transcript makes clear (Br. at 12; Tr. 2576-77). Verzino's testimony was that he was asked whether "Tony's" name could be "Visconti" and he said he did not know what "Tony's" name was (Tr. 2576-77).

spoke directly with Soldano for substantial periods of time and made arrangements for the sale of heroin. On another occasion he drove with Soldano, with Soldano driving, from downtown Manhattan to Queens to take delivery of three kilos of pure heroin (Tr. 2012-42).

On one occasion when Verzino met Soldano at Jimmy's Backyard in Port Washington, Long Island, Verzino was accompanied by Frank Caravella, who although not present during Verzino's conversation with Soldano, was in the vicinity. Caravella and Soldano observed each other. When Soldano saw Caravella, he asked Verzino whether Caravella had a sister by the name of Teresa and was told that he did. After Verzino left Soldano he joined Caravella and told him that Soldano had recognized him. Caravella told Verzino that he knew Soldano and said that Soldano worked in a gambling game in downtown Manhattan (Tr. 2032-34).*

After Verzino began to cooperate in August, 1974, he gave a detailed description of the person he knew as "Tony" to agents of the Government, which matched Soldano's description (Tr. 2407-08). See *Brathwaithe* v. *Manson*, 527 F.2d 333, 370-71 (2d Cir. 1975). Verzino's positive in-court identification of Soldano as the man from whom he purchased three kilos of heroin in late January, 1974 was unshaken by cross-examination. *Id.* (Tr. 2620). See *United States* v. *Yanishevsky*, 500 F.2d 1327, 1330-31 (2d Cir. 1974); *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 803 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973).

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* Soldano made no attempt to subpoena or interview Caravella at trial. Caravella was a severed defendant who pleaded guilty to related state charges prior to trial

This proof plainly established that there was no substantial likelihood of irreparable misidentification. *United States* v. *Tramunti, supra*, 513 F.2d at 1116; *Haberstroch* v. *Montanye, supra*, 493 F.2d 483; *United States* v. *Counts*, 471 F.2d 422, 424-25 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States ex rel. Gonzalez* v. *Zelker, supra*, 477 F.2d at 801-08.

Finally, there was corroborative evidence to support the conclusion that Verzino had correctly identified Soldano. See *Brathwaithe* v. *Manson, supra; Haberstroch* v. *Montayne, supra*, 493 F.2d at 485; *United States ex rel. Gonzalez* v. *Zelker, supra*, 477 F.2d at 803-04. He testified that he met with Soldano for the first time at a restaurant-bar called Jimmy's Backyard in Port Washington, Long Island. The next day, in broad daylight, Verzino again met with Soldano in the parking lot of the restaurant after having seen Soldano drive up in a dark blue Buick automobile (Tr. 2012-33). It was stipulated between the Government and Soldano that Soldano resided at 63 Sound View Drive, Long Island, approximately a ten minute drive from Jimmy's Backyard, and that in January, 1974 he had access to and did on occasion drive a dark blue Buick (Tr. 2973, 3501).

Soldano also claims that the trial court erred in failing to instruct the jury on eyewitness testimony pursuant to his request to charge (Soldano Appendix at 40-42). This argument is frivolous.

The short answer to this argument is that the jury *was* specifically instructed with respect to identification testimony. The trial judge instructed the jury at the close of his charge that:

> "You remember that Mr. Blossner on behalf of the defendant Soldano argued that the beginning and throughout the trial, and certainly during

summation, on the issue relative to identification of his client. You remember that he introduced into evidence that book of pictures, and I neglected, or if I didn't neglect, I want to rectify the omission of the following words with regard to that particular defendant: Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the events and to make a reliable identification later." (Tr. 4129).*

This charge was taken directly from the more detailed request made by Soldano (Soldano App. at 40-42).

Although Soldano requested more, he made no objection to the charge actually given on eyewitness testimony (Tr. 4129-30). Nor was the charge deficient. It fully alerted the jury that they should consider the opportunity that the witness had to observe the offender in determining whether to accept the identification testimony. *See, Simmons* v. *United States*, 390 U.S. 377, 383-84 (1968); *United States* v. *Fernandez*, 456 F.2d 638, 643-44 (2d Cir. 1972). In view of the Court's extensive charge on the credibility of witnesses, (see Tr. 4101-09), this was certainly adequate. *United States* v. *Gentile*, *supra*, slip

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* It is not in any event *per se* reversible error in this Circuit for a jury to go uninstructed concerning the dangers of eyewitness testimony especially when the jury is given a comprehensive charge on the credibility of witnesses. *United States* v. *Gentile*, Dkt. No. 75-1283 (2d Cir., Feb. 10, 1976), slip op. 1851, 1863-64; *United States* v. *Evans*, 484 F.2d 1178, 1187-88 (2d Cir. 1973). *See generally Mc Gee* v. *United States*, 402 F.2d 434 (10th Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *Cullen* v. *United States*, 408 F.2d 1178 (8th Cir. 1969); *Barber* v. *United States*, 412 F.2d 775 (5th Cir. 1969); *United States* v. *Barber*, 442 F.2d 517 (3d Cir.), *cert. denied*, 404 U.S. 958 (1971).

op. at 1863-64; *United States* v. *Evans*, *supra*, 484 F.2d at 1187-88.

Finally, notwithstanding Soldano's argument that identification was a significant issue, it was clear from the evidence that it was not. Verzino's testimony, incorporating four meetings with Soldano during which they had face to face negotiations concerning the narcotics transactions and his ability to accurately describe Soldano when he began to cooperate in August, 1974, established beyond question that the only real issue was whether Verzino was telling the truth as to Soldano's involvement or whether he was lying about it. The jury's verdict quite clearly resolved this question.*

POINT VII

The trial court properly excluded written government reports which were triple hearsay in character.

Magnano and Pallatta argue that the trial court erred in declining to receive in evidence certain reports they offered which had been written by Government agents and which contained statements made to those agents by Government informants, detailing yet further statements allegedly made to the informants by Perna and Verzino during the course of the conspiracy. The argument is frivolous.

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* Soldano's counsel suggested in summation that the DEA agent who showed Verzino the photographic spread might have attempted to frame Soldano by telling Verzino that he lived in Port Washington and drove a blue Buick (Tr. 3876-77), notwithstanding the fact that counsel was aware of the identity of the agent but had elected not to called him to the stand. Indeed, the agent was in the courtroom during counsel's summation. (Tr. 3876-77).

The proffered reports contained, respectively, statements made to Special Agent Bradley by Government informant Condello to the effect that Perna told him, Condello, that Perna was concerned about being arrested, and statements made to Detective Rollo by Government informant Culhane to the effect that Verzino had told him, Culhane, that Verzino had killed a Government informant and that Verzino was receiving heroin from a French connection.

Defendants argued below for the admissibility of the former report—Bradley's report incorporating Condello's statements to Bradley—on the ground that it showed that Perna believed even before his arrest that he might be arrested and that therefore he could have fabricated a story with Verzino to frame the defendants at that time, that is, prior to Perna's arrest.*

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* Appellants argued below, as they were compelled to, that Perna and Verzino planned to frame them even prior to the time that either was arrested so that if they were arrested they could conceal their true narcotics sources and associates while they were "cooperating" with the Government. According to this argument, Perna and Verzino planned to fool the Government, frame the defendants, and receive short sentences so that they could resume their narcotics activities after their release (Tr. 425-28, 1011-14).

Appellants were compelled to argue that the conspiracy to frame them began prior to Perna's arrest on February 1, 1974 because of the fact that Perna told agents of the Government of the involvement of some of the defendants in mid-February, 1974, prior to Verzino's arrest on February 25th. For Perna and Verzino falsely to have implicated the defendants together, they would have had to agree on their "story" prior to Perna's arrest. This was so because it had been established that following his arrest, Perna had had no contact with Verzino until after Perna had made a prior consistent statement. Accordingly, absent some pre-arrest joint fabrication, there was no way they could both have told, in substance, the same story unless they were telling the truth from the witness stand.

Even assuming that appellants had a sound legal foundation for the admission of Bradley's report, which they most assuredly had not, what they sought to prove had already been proved when Perna testified on cross-examination that prior to his arrest he was worried that he might be arrested and in fact told Verzino of this concern (Tr. 1011).*

The same is true as to appellants' offer of Detective Rollo's report recounting Culhane's statement that Verzino had told him during the conspiratorial period that he, Verzino, was getting his heroin from a French connection. Verzino testified on cross-examination that he in fact may have told this to Culhane (Tr. 2429-30).**

The only fact which appellants sought to adduce through a document, which was not actually admitted by Perna or Verzino on cross-examination, was a statement contained in an affidavit of Detective Rollo, submitted in support of an application for a search warrant, indicating that Culhane had told Rollo that Verzino had told Culhane that Verzino had killed an informant in another case against Ernest Malizia.***

The offer of Detective Rollo's affidavit, however, was not made under the business records exception of the hearsay rule contained in Rule 803(6) of the Federal Rules of Evidence, as appellants now claim,**** but

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* Magnano and Pallatta ignore this testimony.

** Magnano and Pallatta ignore this testimony also. Verzino testified on re-direct that Culhane asked him for the identity of his source for heroin many times, but that he never told his customers the truth in this regard (Tr. 2561).

*** Verzino denied that he told this to Culhane (Tr. 2295-96).

**** Appellants in their brief assert only that the offer was made under Rule 803 generally. The record is clear, however, that the offer was made under Rule 803(8)(c) (Tr. 2695-96, 3074-81).

under the hearsay exception contained in Rule 803(8)(c), which provides in pertinent part as follows:

> "(8) . . . Records, reports, statements . . . of public offices or agencies, setting forth . . . (C) . . . against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

The trial court ruled that Detective Rollo's affidavit was inadmissible:

> "As we read Rule 803(8)(C) which deals with public records and reports, particularly factual findings, we can see no way whatever under that rule that opens the door to the receipt into evidence of X [Rollo Affidavit] for identification.
>
> What's attempted to be gotten in here is the rankest kind of hearsay.
>
> It would be a body blow if it had been established by actual fact, and to say that body blow can nevertheless be accomplished by merely getting a paper to be marked in evidence is in and of itself the answer why this must not be received.
>
> We do not know how this can come in under any of the exceptions to the hearsay rule delineated in the Federal Rules of Evidence. As we see it, the answer is confirmed and positive. It is excluded. That is the Court's position of the motion to receive in evidence Exhibit X for identification" (Tr. 3080-3081).

The court's ruling was clearly correct.* In no manner could the affidavit of Rollo be said to include factual findings. It simply contained, among other things, references to what Culhane had told Rollo about what Verzino had said to Culhane.

Moreover, not only did the Government contend that Culhane was untrustworthy (see Tr. 2699), but there was also testimony from Verzino that Culhane had been addicted to narcotics and was one of Verzino's narcotics customers (Tr. 1875, 2620).** Based on this record and given the fact that Culhane was available as a witness, the court properly excluded the affidavit containing Culhane's hearsay statements.*** See *Colvin* v. *United States*, 479 F.2d 998, 1003 (9th Cir. 1973).

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* Appllants claim that all of the informant statements they attempted to introduce were contained in government reports they offered. This is not so. Although Culhane's reference to Verzino's alleged statement with respect to killing the Malizia informant was contained in a report, the report was never offered. Rollo's affidavit, however, which contained Culhane's allegation, was offered. (Tr. 2695-96, 3074-81).

** Rule 803(8)(c) provides that a document otherwise within the exception shall be excluded if "the sources of information or other circumstances indicate lack of trustworthiness."

Appellants contend that the Government vouched for Culhane's credibility by using him as an informant for purposes of obtaining a search warrant. This is not so. The search warrant involved here was a New York State warrant. Further, appellants never made a record below to contest the Government's claim that Culhane was unreliable.

*** One possible reason counsel for Pallatta and Magnano chose not to call Culhane to testify could very well have been that Culhane reported to agents after Verzino and Caravella had been arrested on February 25, 1974 that he met with Caravella in jail and Caravella told him to tell Verzino that "Big Nose", Verzino's source of supply, had sent word to Caravella that he wanted $300,000 which Verzino owed him (GX 3502 WW). Special Agent Scrocca testified that Pallatta was also known as Nose (Tr. 2719).

Appellants reliance on *United States* v. *Smith*, 521 F.2d 957 (D.C. Cir. 1975), is misplaced.

First, *Smith* involved primarily a consideration of the business records exception to the hearsay rule contained in Rule 803(6), on which appellants did not rely below.*

Second, even assuming appellants had expressly relied on the business records exception below, they still would be entitled to no relief under *Smith*. *Smith* held that a police report incorporating statements of the victim-witness in a robbery case, in which the entire case was premised on the witness' testimony, were admissible under the business records exception to the hearsay rule when the report contained statements of the witness which differed from his trial testimony on the crucial issue of identification. *Id.* at 962-69. In *Smith*, unlike here, both the maker of the report, a police officer, and the declarant testified and the Government therefore would have had an opportunity to question the declarant with respect to the discrepancies between his trial testimony and the statements he made which were contained in the police report had the report been properly admitted into evidence.** The declarant here, Culhane, did not

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* Hence, appellants did not even attempt to elicit from the agents that the reports and affidavit involved here were prepared and kept in the regular course of business as would be essential in establishing a proper foundation for admission. Rule 803(6).

** *Smith* did recognize that the victim-witness' description of the crime contained in the police report would not be admissible under the business records exception because these statements were not made in the witness' regular course of business. The court did recognize, however, that these statements would be admissible as prior inconsistent statements. *Id.* at 964-65.

Appellants' statement in their brief that both Condello and Culhane were acting in the regular course of business as government informants when they provided information to the authorities is frivolous as there was no proof that it was part of their regular course of business to supply informatiton to the Government (Magnano-Pallatta Br. at 40).

testify in the case although he was available as a witness. Further, the court's holding in *Smith* that the police report was admissible under the business records exception was premised upon the fact that "[w]here identification is the determinative issue, and where the identification hangs upon the credibility of a single witness, impeaching evidence of the sort tendered is too important to be excluded." *Id.* at 969. Here, the proof sought to be admitted was Culhane's statement to Rollo that Verzino had told Culhane that Verzino had killed a Government informant. Although contradicting Verzino's denial that he said this to Culhane, the proof had nothing to do with the guilt or innocence of the defendants, unlike the hearsay statements in *Smith* which were crucial with respect to the identification of defendant and, therefore, to his guilt or innocence.

Appellants' claim that they were entitled to an instruction under *Dyer* v. *Mac Dougall*, 201 F.2d 265 (2d Cir. 1952), that the jury could infer that the truth was the opposite of what Verzino asserted, that is, that in fact he had told Culhane that he killed a Government informant, is equally without merit.

In *United States* v. *Jenkins*, 510 F.2d 495, 499 (2d Cir. 1975), this Court suggested that for the jury to draw such a negative inference (and thus find that the opposite of Verzino's testimony was true) there must be independent evidence in the record to support such an inference. Here, there was no such proof.*

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* We limit our consideration solely to Culhane's allegation that Verzino told him he had killed the informant because, as previously noted, the other proof which appellants claim should have been received to show that Perna and Verzino were lying was actually adduced through the admissions of Perna and Verzino during cross-examination.

In any event, given the fact that the jury here found defendants guilty beyond a reasonable doubt, it is "highly dubious" that the jury could have simultaneously disbelieved the Government witnesses whose testimony was essential to this finding. *Ibid.*

POINT VIII

The charge to the jury was consistent with the law.

Appellants allege an array of errors, both plain and reversible, in the charge to the jury. Their arguments are without merit.

A. Conspiracy

1. The agreement

Lucas contends that the court did not adequately define a single conspiracy. In essence, he asserts that the court failed to instruct the jury that conspiracy requires proof of an agreement and failed to define this essential element of the crime.

It is, however, abundantly clear that the jury was instructed that an *agreement*, a meeting of the minds, was an essential element of the crime of conspiracy. This necessary element of agreement, contrary to Lucas' assertions, is mentioned throughout the charge on conspiracy (Tr. 4048, 4050, 4051, 4052, 4054, 4056-61, 4070-74, 4088, 4157, 4164-65, 4166, 4172, 4174, 4180-81, 4183).

Moreover, the court repeatedly instructed the jury, in accordance with the classic definition that a conspiracy is a combination or agreement of two or more persons

to accomplish a criminal or unlawful purpose by concerted action and that the gist of the crime is an unlawful agreement or combination to violate the law (Tr. 4058, 4060, 4070, 4088, 4158, 4163, 4164-66).

In any event, this portion of the charge was not objected to below and Lucas does not even contend the alleged errors are plain (*Fed. R. Crim. P.* 30, 52(b)). Accordingly, the claim of error has been waived. *United States* v. *Ingenito*, Dkt. No. 75-1312 (2d Cir. March 16, 1976), slip op. at 2689-90.

2. Each defendant's membership

Lucas also contends that the court permitted the jury to find a defendant guilty of conspiracy without analyzing his own acts and statements. His argument is that a defendant's membership in a conspiracy can be proven by, and only by, his own words and conduct. Lucas is mistaken both as to the facts and the law.

In *United States* v. *Nuccio*, 373 F.2d 168, 173 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967), this Court, per Judge Friendly, in rejecting a claim similar to the one made by Lucas, stated that in determining a defendant's membership in a conspiracy ". . . all the law requires is that the jury find, on the basis of all evidence properly admitted by the judge, a conspiracy and each defendant's purposeful entrance into it."

In any event, the court here specifically charged the jury that:

> "[i]n determining whether or not a defendant, or any other person was a party to or member of such a common plan, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other

person, in such a common plan must be established by evidence as to his own conduct—that is, what he himself knowingly said or did." (Tr. 4068).

Accordingly, defendants here received more favorable instructions on this issue than those to which they were entitled.

Lucas purports to rely on *United States* v. *Tramunti*, *supra*, in support of his claim. But the jury instructions given here on the issue of individual participation were almost identical to the language approved by this Court in *Tramunti*. Compare Tr. 4076-78 with *Tramunti*, 513 F.2d at 1107. Consequently, Lucas' argument is incomprehensible.

When the court's charge on conspiracy is read as a whole, as it must be, it is clear that the jury was given not only adequate but thorough instructions on this point. *See also United States* v. *Calarco*, 424 F.2d 657, 661 (2d Cir. 1970), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Bujese*, 378 F.2d 719, 721 (2d Cir. 1967), *cert. denied*, 401 U.S. 978 (1971); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968).

3. Responsibility for acts and statements of co-conspirators

Although conceding that it is the law that acts and declarations of one co-conspirator may be considered against another co-conspirator once it is shown in accordance with established standards that both are members of the conspiracy, see *United States* v. *Cohen*, 489 F.2d 945, 950 (2d Cir. 1973); *United States* v. *Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974), Lucas contends that the court's charge on this point was error and that this error was objected to below. He is wrong on both counts.

The court did charge the jury that once a defendant has been shown by his own conduct to have been a member of the conspiracy "he adopts as his own the past and future words and acts of all the other conspirators in furtherance of the conspiracy, as he understands it, even though he may not have been present when the words were said or the acts were done." (Tr. 4065-66). But this charge was given not with respect to liability for substantive crimes, as Lucas suggests, but only as to what evidence the jury might properly consider in assessing liability on the conspiracy count, which Lucas ignores. It is clear that such an instruction is proper in this context. *United States* v. *Gypsum, Co.*, 333 U.S. 364, 393 (1948); *United States* v. *Ramirez*, 482 F.2d 807, 816 (2d Cir. 1973), *cert. denied*, 414 U.S. 1070 (1974); *United States* v. *Smith*, 343 F.2d 607 (2d Cir. 1965).

Lucas also contends in error that this instruction was objected to below (Lucas Br. at 35). In truth, the objections raised at the places in the transcript on which Lucas now relies were made by a defendant other than Lucas with respect to the court's *Pinkerton* charge as it related to several substantive charges against that other defendant.* At no time was Lucas' current objection to the portion of the court's charge relating to liability for the acts and statements of other co-conspirators ever raised below. Consequently, Lucas' current claim has been waived. *Fed. R. Crim. P.* 30; *United States* v. *Ingenito*, *supra*, slip op. at 2689-90.

4. The "dangers of conspiracy"

Lucas contends, without supporting authority, that the court's remarks about what Lucas calls the "dangers

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* The limited *Pinkerton* instruction is discussed at pp. 115-120, *infra*.

of conspiracy"—constituting less than one page in a very substantial charge—constitute reversible error (Tr. 4057). The claim was waived, however, by Lucas' failure to object in the trial court to the portion of the charge about which he now complains. *United States* v. *Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975); *United States* v. *Pinto*, 503 F.2d 718, 723-24 (2d Cir. 1974).

Moreover, on the merits and as Lucas acknowledges, similar remarks were not grounds for reversal in *United States* v. *Lozaw*, 427 F.2d 911 (2d Cir. 1970). The trial court's remarks here concerning collective criminal agreement were largely consistent with the language employed by Mr. Justice Frankfurter in *Callanan* v. *United States*, 364 U.S. 587, 593-94 (1961) to discuss the same subject.

Lucas' current suggestion that the "risk was enormous" that the jury might have been tempted to decide the issues on "extraneous standards instead of legal ones" is frivolous. It not only is unsupported by any legal authority but ignores the court's repeated instructions to the jury that they should determine the issues in the case based solely on the evidence adduced at trial. See, *e.g.*, Tr. 4024-27; *United States* v. *Lozaw*, *supra*, 427 F.2d at 917.

B. The testimony of accomplices and defendants

Magnano, Pallatta, Lucas and DeLutro contend that the trial court's instructions on accomplice testimony were inadequate. Specifically, they claim that the court erred by not instructing the jury in accordance with the cautionary language concerning accomplices found in *United States* v. *Padgent*, 432 F.2d 701, 704 (2d Cir. 1970), and that its failure to do so, when constrasted with its cautionary instruction on the credibility of a defendant's testimony—which allegedly "was stated in the strongest

terms" (Magnano-Pallatta, Br. 31)—created an advantage for the Government. Neither the law nor the record supports these contentions.

In *United States* v. *Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975), this Court specifically rejected the claim that a charge to the jury on the testimony of an accomplice must include the specific language employed in *Padgent*, and held in unequivocal terms that ". . . the *Padgent* language was in the context of permitting a wide latitude for cross-examination, not as suggested language for instructions."

Moreover, the record indicates that the jury was thoroughly cautioned on the pitfalls inherent in an accomplice's testimony:

> "The accomplice, an associate in performing a crime has the purpose of either promoting, facilitating, incurring or aiding another in committing a particular crime. The *fact a number of government witnesses are accomplices or have criminal records is to be carefully considered by you as bearing upon their credibility.*
>
> It is to be expected that the participants in an enterprise so unholy and so illegal will not be upright gentlemen.
>
> *Nevertheless, that doesn't say that you can settle for less than what the law demands.* You must realize, I am sure, that in the prosecution of a trial the Government is frequently called upon to use witnesses who are accomplices. Often it has no choice. This is particularly so in case of conspiracy. Frequently it happens that only the members of the conspiracy and he [sic] or their accomplices have evidence which is relevant to and important to the case.

However, it does not follow, because a person has acknowledged participation in a crime, or is an accomplice or has a criminal record, that he is not capable of giving a truthful version of what occurred. That is for you to decide.

As with courage, so it is with truthfulness. It frequently comes from the most unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushing forth.

The testimony of such persons, however, should be viewed with caution, must be scrutinized with the utmost circumspection.

The fact that Mr. Amorosa is convinced, the fact that counsel for the defense are not convinced—in fact, they denounce it with every bit of energy they can bring in back of their words—is of no concern to me or to us. It is what you think, you the jury. *But you must be cautious when it comes to relying on the testimony of a wicked person who is an accomplice.* What I am emphasizing is that that particular element or elements does not automatically nullify them, but you have to decide that issue, *and so you will consider whether the testimony was inspired by self-interest, personal advantage, hostility or whatever other human factors may be involved. You should consider whether the testimony of such a witness was a fabrication induced by a promise or even a belief that they will receive favorable consideration in their respective cases.*

* * * * *

So if you find the testimony of any of these accomplices was deliberately untruthful, reject it. *If upon a cautious and careful examination you*

> *are satisfied that the witnesses have given a truthful version,* and the Government has sustained its burden of proof beyond a reasonable doubt, in all other respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise, the defendants are entitled to an acquittal." (Tr. 4101-4103). (emphasis added).

This charge clearly described the pitfalls of accomplice testimony. *United States* v. *Bermudez, supra,* 526 F.2d at 99; *United States* v. *Corallo,* 413 F.2d 1306, 1322-23 (2d Cir.), *cert. denied,* 396 U.S. 958 (1969). See *United States* v. *Wiener,* Dkt. No. 75-1218 (2d Cir. March 24, 1976), slip op. 2753, 2758 n.5. Further, unlike the charge disapproved in *United States* v. *Gonzalez,* 488 F.2d 833 (2d Cir. 1973), the charge here was simple and straightforward.*

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* In light of the balanced and proper character of the court's accomplice charge, appellants' efforts to paint it in marked contrast to the court's rather standard instructions bearing on the credibility of the two defendants who did testify must fall of their own weight. The terms of these latter instructions were not unduly favorable to the Government. Although the court charged that a defendant has an interest greater than any other witness, see *Reagen* v. *United States,* 157 U.S. 301, 310 (1895); *United States* v. *Mahler,* 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Sullivan,* 329 F.2d 755 (2d Cir.), *cert. denied,* 377 U.S. 1005 (1964); *United States* v. *Paccione,* 224 F.2d 801, 803 (2d Cir.), *cert. denied,* 350 U.S. 896 (1955), it also pointed out that such an interest is not incompatible with a defendant's capability of telling the truth (Tr. 4112). As such the charge was wholly proper. *United States* v. *Talkow,* Dkt. No. 75-1251 (2d Cir. March 26, 1976), slip op. 2813, 2823 & n.3; *United States* v. *Martin,* 525 F.2d 703, 706 (2d Cir. 1975).

Moreover, contrary to appellants' attack on the assertedly imbalanced nature of the court's charge the latter also addressed itself to the credibility of the testimony of Government officials and employees, instructing the jury that they were entitled to take into account any "interest or any factor which may have influenced [those officials and employees] to color or fabricate their testimony." (Tr. 4108).

Lucas claims that the error that inheres in the failure to give the requested accomplice charge based on *Padgent* was "exacerbated" by the appearance of judicial bias in favor of the Government, and boldly alleges that the court "distorted and added to the evidence on a crucial issue . . . ." Lucas Br. 45-46. The serious allegation is without merit.

Lucas' charge is premised on statements addressed by the trial court to the jury during the course of Perna's cross-examination at a point in time immediately after Perna had been impeached. Perna had testified in response to defense counsel's question that no one had ever told him that he would not receive the maximum penalty on his pleas of guilty to narcotics violations in federal court, ninety years (Tr. 1321). The minutes of his plea allocution, furnished to the defense by the Government, revealed that he had been told by Judge Cooper that "I am not giving you the maximum but I have to tell you what the maximum is so that you will know what you are up against. . . ." (Tr. 1321-22; GX 3501(H)). After Perna was impeached by this exhibit, Judge Cooper made a statement to the jury explaining the process of plea and sentence (Tr. 1322-25). At the outset of these explanatory remarks, rather than attempting to buttress Perna's credibility, as Lucas' claims, Judge Cooper stated that it was proper for defense counsel to question Perna with respect to this matter and that it in fact "touched upon the credibility [of Perna]." (Tr. 1322-23). Consequently, Judge Cooper did nothing to distort or obscure the fact that Perna's trial testimony was arguably inconsistent with what had occurred at the time of his plea.* Indeed,

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* Lucas moved prior to sentence to have Judge Cooper recuse himself for bias. He raises no claim here that the denial of his motion was error. The Government's affidavit in opposition to this motion, which negates its validity, is printed in Lucas' Appendix at A576-A591.

his remarks highlight the fact that Perna was indeed impeached and properly so. The bulk of the remainder of Judge Cooper's challenged remarks did no more than correctly set out for the jury the duties imposed by law on a district judge in connection with an offer and acceptance of a defendant's plea of guilty, and thereby clarify for them the fundamental differences, as well as a judge's role, in the plea and sentencing proceedings. This limited intervention by the trial court, which rather clearly was intended solely to disabuse the jury of any misconceptions that may have been created by the immediately preceding testimony, was a wholly proper exercise of the trial court's power to clarify testimony. *E.g.*, *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-08 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973); *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States* v. *Brandt*, 196 F.2d 653, 655 (2d Cir. 1952).

Moreover, nothing in Judge Cooper's remarks provides any support for Lucas' allegation (Lucas Br. at 43) that the jury may have understood those remarks to mean that Perna's testimony as a Government witness would not be considered by the court in mitigation of sentence or that there was a serious possibility that Judge Cooper would in fact impose on Perna the 90-year maximum term of imprisonment. Indeed, it is highly doubtful that any juror ever believed that Perna at any time ever viewed the prospect that the maximum 90-year term of imprisonment would actually be imposed on him as anything other than a mere theoretical possibility. *Compare United States* v. *Duvall*, Dkt. No. 75-1225 (2d Cir. Feb. 26, 1976), slip op. 2123, 2139-40. If that be so, the remarks of the court that appellants now criticize so heavily could have had little or none of the pernicious effect on the jury that appellants attribute to them.

Equally misguided is Lucas' attempts to support his meritless argument of judicial bias by reference to Judge Cooper's statement that it was permissible for Perna to plead guilty in the Southern District of New York, pursuant to Rule 20 of the Federal Rules of Criminal Procedure, to certain of the offenses contained in an indictment filed in the United States District Court for the District of New Jersey (Tr. 1068-70). There was simply nothing incorrect or improper in the court's effort to clarify for the jury how and why the transfer of Perna's case had occurred, and thereby dissipate any apparent mystery or misconception. Indeed, it was Judge Cooper who elicited from Perna that from the transfer Perna expected to "get consideration for [his] efforts in connection with the government's case." (Tr. 1070). Judge Cooper's efforts not only did not prejudice but served to further the interests of the defense. The absence of any prejudice to defendants is evidenced by the fact that not one of the several defense counsel below saw fit to object to the remarks now challenged on appeal or to request a curative instructive. Accordingly, the claim of error has been waived. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir 1965), *(en banc)*, *cert. denied*, 383 U.S. 907 (1966).

In any event, Lucas has taken this situation entirely out of context. Earlier in Perna's cross-examination, prior to the trial court's remarks challenged here, Perna had admitted that he had successfully persuaded the United States Attorney's Office for the Southern District of New York to assist him in having the federal prosecution against him, venued in New Jersey, transferred to the Southern District of New York, because he did not want to appear before a judge in New Jersey (Tr. 981-90). Accordingly, wholly apart from Judge Cooper's remarks, the jury was clearly aware that it was the Government which had acted to have Perna's prosecution transferred to the Southern District of New York and that it had done so in response to Perna's express desire.

Finally, the possibility that the jury might have interpreted any of the remarks of the trial court challenged on this appeal as expressions of bias in favor of the Government was virtually eliminated by the thorough admonitions to the jury not to do so contained in the court's final instructions.*

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* In pertinent part the trial court charged (Tr. 4037-39):

I can tell you how I feel about the facts. I can comment on them openly, distinctly pointing out, however, that you and you alone are the judges of the facts.

I shall do no such thing, and I never have. I don't believe that I should praise you, do you honor, rise when you come in—and why do I do that? As a sign of respect for the enormity of the burden that you carry—I don't believe that I should praise you, do you honor, speak of you as the ministers of justice, and then invade the orbit of your function. To me, that is talking out of both sides of one's mouth. That is your responsibility and you are going to have to meet it, and I have no doubt that you will.

What more can a judge say than what I told you when you were being selected, that the fact-finding function often proves more burdensome than laying down the law. I know, for the greater part of my own life has been spent as a fact-finder.

Since I have the power to talk about the evidence and even give you my evaluation of it, I distinctly forbid you from reading into the tone of my voice or the emphasis that I may apply here or there to a proposition of law how the Judge feels about the facts. If I wanted to tell you, I would tell you outright, since I have a perfect right to do it.

I have long fought for the proposition that if you've got something you believe in you go up the front way, don't go sneaking around the back. So that if I wanted to tell you my impression of some of the evidence, I'd come right up the front way, because I've got the power to do it. I don't have to resort to innuendo.

I want to rush in and say don't you dare try to spell out how the Judge feels about any fact by the tone of my voice or the way I move about. My function is to instruct you as to the law, and it is your sworn duty—you will remember I emphasized it while you were being selected—to apply the law as I state it to you in these instructions and apply it to the facts as you, the jury, find them to be.

C. Reasonable doubt

Lucas, De Lutro, Magnano and Pallatta contend that the portion of the court's charge defining reasonable doubt was erroneous in several respects. The contentions are meritless.

The court's definition of reasonable doubt was in full as follows:

> Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.
>
> A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persausiveness.
>
> Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start

to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives—then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.

One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt (Tr. 4044-46).

Appellants first contend that it was error to decline to charge the jury in the express language of *Holland v. United States*, 348 U.S. 121, 140 (1954) that a rea-

sonable doubt ". . . is such a doubt as would cause the jury to hesitate to act in matters of importance in their own lives."

Although this Court has said several times that it prefers the "hesitate to act" language enunciated in *Holland*, it also has consistently found free of error the use of the substitute language employed here ("I mean such [an abiding] conviction or [moral] certainty [of guilt] as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives"). *United States* v. *Acarino*, 408 F.2d 512, 517 (2d Cir.), *cert. denied*, 395 U.S. 961 (1969); *United States* v. *Hart*, 407 F.2d 1087, 1091 (2d Cir.), *cert. denied*, 395 U.S. 916 (1969); *United States* v. *Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Nuccio*, 373 F.2d 168, 174-75 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967). In *Acarino* the trial court had defined reasonable doubt, in part, in language very similar to that used here—such a doubt "as you would be willing to rely on in the most important of your affairs." This Court, in upholding that charge, said:

> "Following the Supreme Court's lead in *Holland* . . . , we have often suggested use of the latter concept . . . We do so again, reiterating what we said in Nuccio: 'the "hesitate" language makes the point considerably better.' However, no reversible error, plain or subtle, was committed." 408 F.2d at 517.

Similarly, in *Bilotti*, this Court upheld a reasonable doubt charge virtually on all fours with that given here. The charge in issue there defined reasonable doubt as "an abiding conviction . . . which amounts to a moral certainty," such as the jurors "would be willing to act upon in important and weighty matters in the personal affairs of . . . life." 380 F.2d at 654.

Magnano and Pallatta further contend in error that they were prejudiced because they tailored their summations in reliance on the fact that the court had granted the Government's request to charge on reasonable doubt —a request which incorporated the "hesitate to act" language. Although counsel for Pallatta did object to the court's reasonable doubt charge as given and suggested that the jury be given further the "hesitate to act" instruction, see Tr. 4122, neither he nor any other defense attorney ever articulated for the trial court any felt prejudice arising from their assertedly mistaken reliance on the court's decision to grant in substance the Government's pertinent request to charge. Accordingly, any claim of error grounded on mistaken reliance has been waived. Fed. R. Crim. P. 30; *United States* v. *Acarino*, *supra*, 408 F.2d at 517.*

Second, relying on *United States* v. *Davis*, 328 F.2d 864 (2d Cir. 1964), Lucas contends that the court's instruction that a reasonable doubt is "a doubt founded in reason" was error. But *Davis* held that although this type of charge was " 'not approved' and 'perhaps unwise' [it was] 'not erroneous.' " *Id.* at 868. *Accord*, *United States* v. *Cacchillo*, 416 F.2d 231, 233-34 (2d Cir. 1969); *United States* v. *Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967). In any event, no objection was made below to this portion of the charge and any error, therefore, has been waived. *Fed. R. Crim. P.* 30; *United States* v. *Cacchillo*, *supra*.

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* Moreover, any modest disparity between the language of defense counsel's closing arguments and the court's charge on this subject could hardly have been of any moment. As Judge Friendly said of this very difference in language, "we find it impossible to believe that, in the absence of any evidence such as a request [by the jury] for further instructions, that jurors would retain such a nuance in their minds and be significantly influenced by it." *United States* v. *Nuccio*, *supra*, 373 F.2d at 175.

Third, Pallatta and Magnano claim that it was error for the jury to be told that a reasonable doubt ". . . is not an excuse to avoid the performance of unpleasant duty" and that "[i]f the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty" (Tr. 4045-46). This language, in substance, was approved in *United States* v. *Barrera*, 486 F.2d 333, 339 (2d Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). Again, moreover, since no objection to this language was taken below, appellants' claim on this point has been waived.

Fourth, Magnano and Pallatta argue that it was error for the court to equate proof beyond a reasonable doubt with proof of "significant persuasiveness." They claim that this permitted the jury to convict by the application of a lesser standard, namely, by a preponderance of the evidence. However, not only did all defendants below fail to object to the now challenged phrase, but it is clear that when the reasonable doubt charge is read as a whole, as it is required to be, *United States* v. *Santiago*, Dkt. No. 75-1179 (2d Cir. Jan. 12, 1976), slip op. 6577, 6584, it in no way permitted the jury to convict on a preponderance of the evidence. Appellants cite no authority for a contrary view.

Lastly, Magnano and Pallatta claim error in the court's statement that a reasonable doubt is a "substantial" doubt. This argument is equally as meritless as the others. In *United States* v. *Aiken*, *supra*, 373 F.2d at 299, this Court sustained an instruction that provided that a reasonable doubt is ". . . a substantial doubt and not a speculative doubt." *See also United States* v. *Heap*, 345 F.2d 170 (2d Cir. 1965). In any case, there was no objection to

this term below and the argument, once again, has been waived.

D. The limited Pinkerton instruction

1. Lucas

Lucas argues that the court erred in charging the jury pursuant to *Pinkerton* v. *United States*, 328 U.S. 640 (1946), and that he was prejudiced by it. His argument is without merit and ignores what actually happened.

The court's charge was a limited *Pinkerton* instruction having nothing whatever to do with Lucas. It was strictly limited solely to those substantive counts in which Magnano, Pallatta, Bolella and Soldano were named (Tr. 4092-94). As to Magnano, Pallatta and Bolella, the proof showed that they were partners in a narcotics distribution ring but that they personally did not physically deliver any heroin to the core group. The delivery men for this ring, who physically made the transfers of heroin to the members of the core group, were Frank Ferraro, a/k/a "Smooch," and Carmine Margiasso, a/k/a "Charlie." The latter were fugitives at the time of trial.

Soldano was charged in one substantive count, Count Nine, along with Joseph Malizia, a/k/a "Patsy Pontiac"—also a fugitive—with the possession and distribution of three kilos of heroin in the Southern District of New York. The proof showed that Soldano transferred this heroin to Verzino in Queens and that the latter carried it into the Southern District of New York.

Based on the foregoing the court charged the jury as follows:

> "Now let us go further, Counts 2, 3, and 4 of the indictment charge Joseph Magnano, Frank Pal-

latta, Richard Bolella, and five others who are not on trial, with the substantive offense of distribution of heroin and possession with intent to distribute heroin. There is another way that you may find these defendants guilty of these three substantive counts besides under the principles I have just given you relating to aiding and abetting.

If you find that a conspiracy to distribute heroin existed, that these three defendants were members of it, and that the offenses charged in Counts 2, 3 and 4 were actually committed by another member of the same conspiracy in furtherance of the overall plan, you may find these three defendants guilty of these substantive offenses, even if they were not physically present at the time that the offenses were committed.

In other words, if you find beyond a reasonable doubt that the persons identified as Skooch and Charlie were members of a conspiracy to distribute or sell heroin along with Magnano, Pallatta and Bolella you may find Magnano, Pallatta and Bolella guilty of these three counts if you determine that Skooch or Charley physically distributed the heroin in furtherance of the conspiracy.

The same principle applies with respect to Count 9. This count charges the defendart Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin.

You will recall that government witness Verzino testified that Mr. Soldano sold him this heroin, and that the actual delivery took place in Queens, New York. Queens, New York, is not in the Southern District of New York. You may find Soldano guilty of this charg[illegible]owever, if you find beyond

a reasonable doubt that he was part of the conspiracy to distribute heroin along with Verzino and that he sold this to Verzino and that Verzino took the heroin into the Southern District of New York, which includes Manhattan and the Bronx, with the intention of distributing it. In other words, if you find that Soldano was a member of the conspiracy as charged along with Verzino, and he gave the heroin to Verzino, and that Verzino took it into the Southern District of New York with the intention of distributing it, you may find Soldano guilty of Count 9." (Tr. 4092-94).*

As is obvious, this limited *Pinkerton* charge had nothing to do with Lucas. No *Pinkerton* charge was requested or given as to Lucas because with respect to the substantive crimes with which he was charged there was evidence that he personally distributed or possessed the heroin in question. Accordingly, it is inconceivable that Lucas could have suffered any prejudice. *United States* v. *Finkelstein*, 526 F.2d 517, 522 (2d Cir. 1975); *United States* v. *Miley*, *supra* 513 F.2d at 1208.

The limited *Pinkerton* instruction given was wholly proper and consistent with the original purpose of *Pinkerton* as there was no proof linking Magnano, Pallatta and Bolella with the physical distributions charged in those substantive counts in which they were named although there was abundant proof of their participation in the conspiracy in futherance of which these distributions were made. *Pinkerton* v. *United States*, *supra*, 328 U.S. at 648; *United States* v. *Wilner*, 523 F.2d 68, 72-73 (2d Cir. 1975).

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* Soldano makes no claim here that the instruction was erroneous.

2. Bolella

Bolella was found guilty of Count One, the conspiracy count, and Count Four, charging him and others with the distribution of twelve kilos of heroin in November 1973. The jury was unresolved as to his guilt on Counts Two and Three, which charged him and others with the distribution of two and four kilos of heroin in March 1973, respectively. He now claims that the submission of his case to the jury on Counts Two and Three, even under the limited *Pinkerton* instruction, was error and so prejudiced him that his convictions on Counts One and Four must be reversed. His claim is based on his allegation that there was no proof linking him to the conspiracy in March 1973. His argument is without merit.

There was abundant proof linking Bolella to the conspiracy prior to March 1973 and the jury was entitled to find, under the trial court's limited *Pinkerton* instruction, Bolella guilty of Counts Two and Three.

Although Perna and Verzino met Bolella after March 1973, there was ample proof that he had been a narcotics partner of Magnano, Pallatta and others in the narcotics business prior to March 1973.

Perna testified that in March 1973, during a narcotics related meeting he attended with Malizia, Pallatta, Donnie Boy (Tufaro) and Skooch (Ferraro), Malizia asked Pallatta where Dickey (Bollella) was and why Dickey had not attended any of their previous meetings, all of which related to narcotics. Pallatta said that Dickey was in Florida and would not be back for a month or two. (Tr. 540-42).

When Perna met Bolella in October 1973, they discussed a price reduction with respect to the heroin Perna, Verzino and Malizia were buying. Bolella said that he

was pretty sure that he could get them a price reduction and that he would speak to his partners about it. Bolella also said that he had been in Florida but expected to stay in New York for several months. (Tr. 671-73).

After Verzino joined the Perna-Malizia partnership in September 1973, Pallatta told him that Pallatta had five narcotics partners and that one of them was Bolella. (Tr. 1907-1908).

During Verzino's first conversation with Bolella in late September or early October 1973, after his release from prison, Verzino asked Bolella whether Bolella and his partners could sell Verzino pure heroin. Bolella said it would be difficu[illegible]ecause he and his partners could not make much profit selling pure heroin to Verzino, but that he would attempt to talk to his partners about it. Bolella also mentioned to Verzino that Malizia had previously asked Bolella about the same thing (Tr. 1922-23). Bolella expressed his concern to Verzino that while in Florida one of his telephone conversations may have been recorded during a wiretap, thereby giving rise to some possible trouble for him. (Tr. 1916-21).

Prior to Verzino's incarceration in 1967, he had known Pallatta, Magnano and Bolella and had dealt with them as a group in connection with narcotics transactions he had had with them.*

Based on this proof, the submission of Counts Two and Three to the jury as to Bolella under a limited *Pinkerton* instruction was clearly justified. The proof adduced at trial not only permitted the jury to find that he had been a member of the narcotics conspiracy from the

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* Pallatta told Verzino that Bolella was one of five partners he had (Tr. 1855, 1908). He told Perna that he had been receiving a shipment of pure heroin every six months for "years" (Tr. 759-60).

beginning of 1973, but that he had been so for some time considerably before that. See *United States Wiley*, 519 F.2d 1348, 1350, n.3 (2d Cir. 1975); *United States* v. *Torres, supra*, 503 F.2d at 1124, n.2.

POINT IX

The trial court did not commit error in imposing consecutive sentences on the defendant Bolella.

Bolella attacks the trial court's imposition of consecutive sentences of ten years on the conspiracy count and ten years on Count Four for distributing twelve kilograms of heroin. He argues that the legislative history and intent of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (the 1970 Act) demonstrates that Congress intended that first offenders convicted of narcotic violations would be sentenced to no more than fifteen years imprisonment. This claim is frivolous.

A similar argument was made and rejected by the Second Circuit in *United States* v. *Volot*, 481 F.2d 22 (2d Cir. 1973). There, this Court, after examining the relevant statutory language and legislative history of the 1970 Act, stated:

> "... we believe that rather than evidencing an intent to eliminate consecutive sentences for violations of the Act, the legislative history indicates that the Act's 'sentencing procedures give *maximum flexibility* to judges, permitting them to tailor the period of imprisonment ... to the circumstances invalued in the individual case.' [citation omitted]." 481 F.2d at 26.*

* The Court also stated that "Congress did not intend to eliminate the *possibility* of consecutive sentences where the trial judge deemed them appropriate. We think that the elimination of such a basic procedure as consecutive sentencing should be ac-

[Footnote continued on following page]

See also *Hogan* v. *United States*, 383 F. Supp. 1073, 1074 (S.D. W. Va. 1974).

The rule is well-established that a Court of Appeals may not reverse or tamper with a sentence that is within legal limits. *Dorszynski* v. *United States*, 418 U.S. 242 (1974). Equally well-established is the principle that sentencing decisions are the exclusive function of the trial court, *United States* v. *Del Toro*, 513 F.2d 656, 666 (2d Cir. 1975), absent extraordinary circumstances. *United States* v. *Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973).

But even assuming this Court had the power to review the sentence meted out to Bolella, this would be an inappropriate case in which to reverse the sentence. A reading of the five week trial record clearly shows that Bolella played a major role in this large narcotics distribution scheme as a main supplier to Perna, Malizia and Verzino of vast quantities of heroin. At the time of sentencing, Judge Cooper found that "Magnano, Pallatta and Bolella, along with their partners, sold approximately 46 kilograms of heroin . . . and they received in excess of one half million dollars from Perna and his partners" (Sentencing Minutes, *United States* v. *Mag-*

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complished only by the clearest indication from the Congress." *United States* v. *Volot*, *supra*, at 26. More recently, the Fifth Circuit, in upholding the imposition of consecutive sentences for conspiracy violations arising out of the same behavior, ruled that the consecutive sentences for each criminal objective of the conspiratorial agreement did not conflict with the double jeopardy clause. *United States* v. *Houltin*, 522 F.2d 943, 949-51 (5th Cir. 1976). Implicit in this ruling was the notion that Congress intended to punish the crime of conspiracy just as severely as the ultimate objective (the substantive acts) of the unlawful agreement.

nano, et al., Dec. 3, 1975, at p. 59).* In short, Bolella was engaged in a hideous crime in which he profited from the sale of a substance which wreaks havoc on our city and death, misery and anguish on the user. Deterrence and retribution surely warranted a severe sentence.

Moreover, the trial record amply demonstrated that Judge Cooper understood the range of his discretion and considered the relevant factors and proof at trial against Bolella and the other defendants before him (Tr. of Sentencing Minutes, *United States* v. *Magnano, et al.*, Dec. 3, 1975, at p. 48-60; 63-68; see also Point XI, *infra*).

Thus, in light of the nature of the crime, the lengthy duration of the conspiracy and its background, the immeasurable profits realized, Judge Cooper justifiably exercised his discretion in imposing consecutive sentences.

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* Additionally, Judge Cooper stated at sentencing, "Magnano, Pallatta and Bolella have been engaged in distributing heroin, says the evidence, from the beginning of the previous decade. The trial proof established that Magnano, Pallatta and Bolella were receiving during the course of the conspiracy highly confidential information relating to federal narcotic law enforcement activities which was channeled to them from or through a law enforcement official. To date the identity of this corrupted official remains unknown. We have presided over trials involving the sale of substantial quantities of narcotics. Never, however, on a scale as extraordinary as this with its enormous quantities of heroin bought and sold on an almost daily basis. The activities of this group emphasize the overlords and regimental tiers of operation, all governed by tight maneuvers and bold enough to successfully avoid governmental detection of which they were constantly apprehensive and aware. Nor have the important operational details of their cruel enterprise come to light even at this late date. Let's face it. So inhuman, ruthless and cold blooded was their approach to the execution of their nefarious scheme that we sat aghast at the unfolding of the enormity of their horrifying indifference to life's values." (Tr. of Sentencing Minutes, *United States* v. *Magnano et al.*, Dec. 3, 1975, p. 51-52).

See *United States* v. *Campisi*, 292 F.2d 811, 814-15 (2d Cir. 1961), *cert. denied*, 368 U.S. 958 (1962).

POINT X

The written judgment and commitment did not increase the sentence imposed by the court.

Lucas argues that the written judgment of his conviction enhanced the oral sentence imposed by the trial court and, accordingly, must be modified to conform with the oral pronouncements. This claim lacks merit.

Announcing Lucas' sentence in open court on January 27, 1976, Judge Cooper stated:

> "The sentence imposed by this Court is as follows:
>
> On count one, the defendant is sentenced to 20 years plus $50,000 fine. On count five, 20 years and $50,000 fine. Those two sentences on counts one and five are to run concurrently.
>
> Count six, we impose a sentence of 20 years and a $50,000 fine. Count seven, we impose a sentence of 20 years and $50,000 fine. The jail commitments in counts six and seven are concurrent. However, the sentences imposed, the jail sentences imposed in counts six and seven are to run consecutively and not concurrently with the sentences imposed in counts one and five.
>
> The fines, however, are not in any way to be diminished, so that it is the intention of the Court to impose a sentence of jail totalling 40 years and a fine of $200,000.
>
> * * *

> ...in addition to the sentence imposed, the law commands that I add six years special parole. That is mandatory and must be added on to the sentence already announced." (Tr. of Sentencing Minutes, *United States* v. *Lucas*, Jan. 27, 1976, at 31-32).

In the written judgment and commitment dated the same day, the following notation is recorded:

> "This sentence to be in addition to, and exclusive of, any sentence now being served or to be imposed in the future" (Lucas' App. at 637).

It is well-settled that when a conflict exists between an oral sentence and the terms of the written judgment, the former must be given effect. *United States* v. *Marquez*, 506 F.2d 620 (2d Cir. 1974). However, where the oral pronouncement is ambiguous, the written judgment must be considered in order to determine the intention of the sentencing judge. *See Baca* v. *United States*, 383 F.2d 154, 157 (10th Cir. 1967), *cert. denied*, 390 U.S. 929 (1968); *Payne* v. *Madigan*, 274 F.2d 702, 705 (9th Cir. 1960), *aff'd*, 366 U.S. 761 (1961). In this regard, the Fifth Circuit observed in *Scott* v. *United States*, 434 F.2d 11, 20 (1970):

> "The law is well settled that if there were any conflict between the oral pronouncement and the written judgment itself, the terms of the oral pronouncement would control. So, if the two conflict, the oral pronouncement controls. On the other hand, there may be no conflict but simply an ambiguity. The actual intention of the sentencing judge is to be ascertained both by what he said

from the bench and by the terms of the order he signed, or from his total acts." *

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* Here, too, as with Bolella and the other defendants, Judge Cooper stated his reasons for imposing a much deserved sentence on Lucas:

". . . let me just say . . . that in 36 years of judicial service on these two blocks which include this courthouse, I don't remember a more serious involvement than Lucas. . . . This was a day-to-day operation over a period of years, the sale of drugs in large amounts, the like of which I have never witnessed, for cash. . . ."

* * * * *

". . . Our Court of Appeals recently found occasion to say something that is particularly pertinent. I say it with sadness, because Lucas was the one that the Court undoubtedly was thinking of. The victims, the legions of miserable creatures many of them affected for the rest of their days, weak-willed who have succumbed to the product that Lucas trafficked in day in and day out."

* * * * *

". . . The Government in a memorandum which we endorse found occasion with respect to this sentence to say the proof at trial established that Lucas was the major heroin customer of Perna, Verzino and Malizia. The testimony implicated Lucas in the receipt of approximately 100 pounds of heroin and four pounds of cocaine from Perna, Verzino and Malizia for which Lucas paid approximately $900,000 in cash. It also established that Lucas controlled an organization which is one of the largest, if not the largest, street level distributor of heroin in New York City during the year 1973. Frank Lucas, like the other convicted defendants, has been a major figure in heroin trafficking for years in the New York metropolitan area. . . The wealth that he has accumulated over the years from this major narcotics trafficking could not be overestimated. The seizure of approximately $585,000 in cash from his home in January of 1975 is only a small reflection of the fruits of this man's operation in narcotics. Proof was adduced at trial showing that Lucas is the president of a corporation in the State of North

[Footnote continued on following page]

Here, it is clear that the sentencing judge did not address himself in his oral pronouncements to the question whether Lucas' sentence was to be served consecutive to or concurrent with either already imposed sentences of imprisonment or those to be imposed in the future, if any. Accordingly, the oral sentence is ambiguous on the point, and the written judgment must govern.

Carolina which was able to obtain a mortgage in the approximate amount of one half million dollars. . ."

* * * * *

". . . You tell me about Lucas' children, and I am supposed to close my eyes to other children who also want a chance for their place in the sun. What about what Lucas did to them. They are loved by their parents, too. Counsel seeks reformation. I tried to employ that all the years of being a judge where that is indicated. It is stupid. It is the nth degree of ignorance to write a prescription for an ailment that one knows is absolutely devoid of remedy. Here there isn't even a grain of contrition, not even the very fundamentals that must be in evidence before an approach of that kind could be attempted. I think I have a right to say that my own attitude in sentencing has always reflected, as I surmise it does here, that as with guilt each sentence is personal, and that is what makes it a torment that one has to read and reread, and march up and down the floor, trying to figure out what is fair to a defendant and what is fair to the community alike. We have a second narcotics offender here. The maximum on one count is thirty years and a $50,000 fine. If this Court were devoid of any sensitivity whatever to the possibility that even the most wickedly entrenched and corrupt and ruthless creature could still rise, we would mete out four times thirty and four times $50,000. There is no sense in reciting what is revealed in the probation report. It's already been made a part of the record. There is very little in it that helps the defendant. I have looked here and there for that which could somehow offset the totality of the inquity that is before the Court and with which the Court must deal . . ." (Tr. of Sentencing Minutes, *United States* v. *Lucas, January* 27, 1976, at 6; 11-13; 17; 29-31).

But there is a far simpler answer to Lucas' claim that the Judge improperly ordered him to serve his federal term of imprisonment consecutive to then existing sentences. At the time of sentencing, Lucas, having been convicted of violation of probation, was serving a 2 to 3 year sentence in New Jersey State Prison in Trenton, New Jersey. (Tr. Sentencing Minutes, *United States* v. *Lucas*, January 27, 1976, at 13; 59-61). Under Title 18, United States Code, Section 4082 the Court had no power to order the federal sentence to run concurrently with the prior State sentence. See, *e.g.*, *United States* v. *Tomaiolo*, 294 F. Supp. 1296 (E.D.N.Y. 1969); *United States ex rel. Murphy* v. *Carlson*, 389 F. Supp. 669, 672 n.2 (E.D. Pa. 1975).

With respect to Lucas' claim that the written judgment was "unlawful" insofar as it provided he was to serve his sentence "exclusive of any sentence . . . to be imposed in the future," we note first that this claim is unsupported by a even a single authority and second that the issue is clearly premature. Lucas was neither awaiting sentence on any other conviction at the time of his sentencing before Judge Cooper, nor is he now. Accordingly, it would only become necessary to reach the question whether Judge Cooper's order was erroneous if (1) Lucas were again convicted for a crime; (2) he was then sentenced; and (3) the sentencing judge desired to impose a concurrent jail sentence. This Court does not sit to resolve such hypothetical issues. See *United States* v. *Sir Kue Chin*, Dkt. No. 75-1227, slip op. at — (2d Cir., April 21, 1976).

POINT XI

The sentencing procedure employed in this case did not violate Rule 32(c)(3) of the Federal Rules of Criminal Procedure.

Bolella contends that his sentence should be vacated and his case remanded for resentence because the sentencing judge did not permit his attorney, pursuant to Fed. R. Crim. P. 32(c)(3)(A), to read the presentence report.

Rule 32(c)(3)(A) directs the sentencing judge to permit defense counsel to examine a presentence report "upon request". Here there is no dispute that both on the day of sentence, December 3, 1975, and prior thereto Bolella's counsel, pursuant to Rule 32(c)(3)(A), requested to see the presentence report. On the day of sentencing, De Lutro's counsel made a similar request to see the presentence report pertaining to him.* The trial court denied both requests but stated clearly that each defendant would be informed of each and every factor, and only those factors, that the court was relying on in the determination of that defendant's sentence. (Minutes, pp. 3-4, 6-7).** The sentencing procedure employed here was within the requirements of Rule 32(c)(3).

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* When Lucas was sentenced on January 27, 1976, the court permitted him and his counsel, pursuant to their request, to inspect the presentence report prior to sentence. Lucas Sentencing Minutes at 2-3.

** The court said in part:

> In this case, however, I have already said, and I repeat, I shall bring out the factors which the Court is considering and only those factors which enter into our deliberations on this sentence.
>
> For instance, in a couple of the reports there is the allegation that the defendant was deeply involved in loan sharking. I do not and will not give that any weight whatever.

[Footnote continued on following page]

Rule 32(c)(3) does not give a defendant an absolute right to see the presentence report. Subsection (c)(3)(A) states that the court should not permit defense counsel to examine the report "to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons . . ." Further, subsection (c)(3)(B) states:

> "If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties *in camera*."

. . . For instance, suppose I felt quite impressed with the commentary with regard to loan sharking, there wasn't a thing brought out in the course of this trial on loan sharking. What am I going to do? Conduct a hearing to see whether or not the defendant engaged in loan sharking? Am I going to give weight to an assertion made in good faith by the Government that the defendant we learned was involved in loan sharking on a significant scale? The answer is no.

You want to call the Court's attention to something that amounts to a crime? Prove it. And don't get it in that way. So that with me it has always been academic. You just throw that out, as I did here in the instance I gave you. And there have been other points that I have disregarded. And that is the reason I say that I am going to announce just what factors entered into my deliberations, and only those factors that brought about my determination." (Sentencing Minutes, pp. 6-7).

In this case in particular, given the extraordinary character of the offenses proved and the history of violence which attended the prosecution, * it is reasonable to infer that Judge Cooper determined that substantial portions of the presentence reports contained "information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons . . . ." **

In the present case, the sentencing procedure employed was clearly not illegal. Though the reports were not disclosed to the defendants, the disclosure requirements of the Rule were satisfied when the sentencing judge revealed the substance of the reports. See *United States* v. *Virga*, 426 F.2d 1320, 1323 (2d Cir. 1970), *cert. denied*, 402 U.S. 930 (1971); *United States* v. *Holder*, 412 F.2d 212 (2d Cir. 1969); *Duke* v. *United States*, 396 F. Supp. 149, 150 (S.D.N.Y. 1975). The sentencing court made a thorough oral summary of the evidence against each defendant and disclosed the factual information contained in the presentence reports that he relied on in imposing the sentence, including the defendant's age, prior criminal record, if any, military service, fam-

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* Prior to trial defendant Gwynn was felled by two bullets in the back in an apparent and unsuccessful attempt on his life. Also prior to that time eight defendants became, and to this date remain, fugitives.

On March 13, 1976, defendant Chapman, the only defendant as to whom the jury was unable to agree upon a verdict, was murdered by two bullets which lodged in the back of his head. Both crimes of violence are unsolved.

See also Lucas App. at A581, footnote.

** There is no requirement that the sentencing judge state the reasons for his decision not to disclose the presentence report.

ily background and employment history. In fact, when the trial court stated that Bolella's employment record was sketchy and unverifiable, defense counsel interrupted the court to correct what he thought was erroneous information in the reports:

> "Mr. Epstein: Excuse me, your Honor, I apologize to the Court for interrupting, but your Honor's remarks about Mr. Bolella's employment being unverifiable comes as somewhat of a surprise to me. Mr. Bolella's last employer, Mr. Charles Valentine, is here in court at the present time. Mr. Bolella's employment with Mr. Valentine over the years I would say from 1965 through 1974 have all been verified by W2 income tax withholding forms. And Mr. Valentine was interviewed by the Probation Department as well as by Mr. John Wright, the gentleman I engaged.
>
> Mr. Amorosa: That may be so, your Honor, but the government has information that those records are a sham and a fraud.
>
> The Court: That is the answer. And that is what we go by in the report by the probation of the defendant.
>
> However, in reciting that, I want you to know that the weight given to that particular factor is small at best, but it is a part of the recital that a judge should make when he goes into a sentence.
>
> But let me pause for a moment and get the full report so that I will not be doing an injustice consciously. Please be patient.
>
> . . . The Court: Mr. Epstein, you are on your toes, as you should be, and I am grateful to you because you are correct. What I meant to say, and what is revealed after I looked at the Proba-

tion report, is that the Probation Department was unable to verify any of the employments, but the Probation report does say the defendant worked for Charles Valentine, the manager of Park Auto Sales, 3586 Boston Road, Bronx, who reports that since '72 Bolella worked for him as a used car salesman earning $330 weekly.*

From approximately '63 to '72 Bolella claims similar automobile industry related employment with a series of Bronx, New York firms.

Previously, and since leaving school, Bolella was employed as a truck driver and factory worker. So that there was no recital that they verified it. And it is not your fault that they didn't. That is their job.

And so I am not holding it against him. I am accepting this statement and your own comments with regard to his employment. And I order stricken from the record my comment that in his case I have been put on notice that his employment was a sham and a fraud.

Mr. Epstein: Thank you, your Honor." (Sentencing Minutes, pp. 64-66).

Unquestionably, the trial judge afforded Bolella an opportunity in open court to correct any misinformation contained in the presentence report on which the court was relying in determing sentence. Since the trial judge disclosed all the reasons and a summary of the factual information contained in the pre-sentence reports on which the sentence was premised, Bolella cannot now properly claim that he "did not receive that degree of consideration from the Court that would amount to fair

* The Government's trial proof showed that Bolella was in Florida for a good part of 1973. Bolella offered no records at trial to contradict this proof.

play." * His claim that the trial court's procedure prejudiced his right at sentence affronts the plain fact that the procedure employed clearly satisfied the requirements of Rule 32(c)(3). *Cf. United States* v. *Washington*, 504 F.2d 346, 349 (8th Cir. 1974); *United States* v. *Foss*, 501 F.2d 522, 530 (1st Cir. 1974); *United States* v. *Gorden*, 495 F.2d 308, 310 (7th Cir.), *cert. denied*, 419 U.S. 833 (1974); *Johnson* v. *United States*, 485 F.2d 240, 242 (10th Cir. 1973); *United States* v. *Guzman*, 478 F.2d 759, 761 (2d Cir. 1973); *United States* v. *Brown*, 470 F.2d 285 (2d Cir. 1972); *United States* v. *Virga*, *supra*. Accordingly, the sentences imposed by Judge Cooper should not be disturbed.

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* Though Bolella relies on *United States* v. *Brown*, 470 F.2d 885 (2d Cir. 1972), *cert. denied*, 411 U.S. 936 (1973) in support of his request for resentencing, it should be pointed out that in *Brown* the sentencing judge, having refused to disclose the presentence reports, proceeded to impose a three year sentence without any comment or explanation on the record.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DOMINIC F. AMOROSA, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29 day of April , 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

See Attached List

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Dominic F. Amorosa

Sworn to before me this
29th day of April 1976
Gloria Calabrese

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